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ONTARIO LABOUR RELATIONS BOARD REPORTS

January 1993



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1993] OLRB REP. JANUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

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CASES REPORTED

1.	Ford Motor Company of Canada Limited; Re International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 880; Re Group of Employees.....	1
2.	Grant Development Corporation and/or The Ojibways of Pic River, First Nation (The Pic 50 - Heron Bay Indian Band); Re L.I.U.N.A., Local 607	21
3.	James N. Krall; Re C.J.A., Local 785	39
4.	Ontario Hydro, Robert S. Higgins; Re Eric de Buda; Re The Society of Ontario Hydro Professional and Administrative Employees	46
5.	Riverview Manor Nursing Home; Re O.N.A.	54
6.	St. Leonard's Society of Metropolitan Toronto, The Crown in Right of Ontario as represented by the Ministry of Correctional Services, and; Re O.P.S.E.U.....	56
7.	Spooners' Restaurant, Employees of 598142 Ontario Limited carrying on business as; Re The R.W.D.S.U., Local 448; Re 598142 Ontario Limited c.o.b. as Spooners' Restaurant....	77

COURT PROCEEDINGS

1.	Ellis-Don Limited; Re OLRB and I.B.E.W., Local 894	80
2.	Knob Hill Farms Limited; Re U.F.C.W., Local 206, The Crown in Right of Ontario (Minister of Labour), The OLRB and Susan Caterina	83
3.	Plaza Fibreglas Manufacturing Limited, Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd. and Sabina Citron; Re: Ontario Labour Relations Board and United Steelworkers of America	83

SUBJECT INDEX

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed	
ELLIS-DON LIMITED; RE OLRB AND I.B.E.W., LOCAL 894	80
Accreditation - Abandonment - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed	
ELLIS-DON LIMITED; RE OLRB AND I.B.E.W., LOCAL 894	80
Bargaining Rights - Accreditation - Abandonment - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures -	

Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed

ELLIS-DON LIMITED; RE OLRB AND I.B.E.W., LOCAL 894..... 80

Bargaining Rights - Crown Transfer - Ministry of Correctional Services contracting with several community organizations to provide various services to inmates including discharge planning, cultural liaison, and counselling - Whether each contract constituting transfer of part of Crown's "undertaking" to the community agency - Board not persuaded that the right to perform particular services created by subcontract is "part" of Crown's "undertaking" to which bargaining rights attach or which create successorship on execution of contract - Applications dismissed

ST. LEONARD'S SOCIETY OF METROPOLITAN TORONTO, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CORRECTIONAL SERVICES, AND; RE O.P.S.E.U..... 56

Certification - Certification Where Act Contravened - Construction Industry - Discharge - Employer - Interference in Trade Unions - Intimidation and Coercion - Union alleging that when employer learned of certification application, it eliminated all employees known or believed to be union supporters - Parties disputing whether construction company or Indian Band the "employer" - Board finding construction company to be the "employer" and that termination of aggrieved employees tainted by anti-union animus - Union entitled to certification on the basis of membership support in excess of 55 percent and under section 8 of the *Act* - Certificate issuing

GRANT DEVELOPMENT CORPORATION AND/OR THE OJIBWAYS OF PIC RIVER, FIRST NATION (THE PIC 50 - HERON BAY INDIAN BAND); RE L.I.U.N.A., LOCAL 607..... 21

Certification Where Act Contravened - Certification - Construction Industry - Discharge - Employer - Interference in Trade Unions - Intimidation and Coercion - Union alleging that when employer learned of certification application, it eliminated all employees known or believed to be union supporters - Parties disputing whether construction company or Indian Band the "employer" - Board finding construction company to be the "employer" and that termination of aggrieved employees tainted by anti-union animus - Union entitled to certification on the basis of membership support in excess of 55 percent and under section 8 of the *Act* - Certificate issuing

GRANT DEVELOPMENT CORPORATION AND/OR THE OJIBWAYS OF PIC RIVER, FIRST NATION (THE PIC 50 - HERON BAY INDIAN BAND); RE L.I.U.N.A., LOCAL 607..... 21

Certification - Employee - Union seeking to represent bargaining unit of salaried "supervisors" - Whether exercising "managerial functions" within the meaning of s.1(3) of the *Act* - Board weighing various factors, including the number of supervisors in relation to subordinates, the exclusivity of the supervisory function, and the variety of circumstances placing supervisors' duties and obligations at odds with employees they supervise - Board concluding that supervisors not "employees" within meaning of the *Act* - Application dismissed

FORD MOTOR COMPANY OF CANADA LIMITED; RE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 880; RE GROUP OF EMPLOYEES 1

Collective Agreement - Abandonment - Accreditation - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement

signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed

ELLIS-DON LIMITED; RE OLRB AND I.B.E.W., LOCAL 894 80

Construction Industry - Collective Agreement - Abandonment - Accreditation - Bargaining Rights - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed

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Construction Industry - Certification - Certification Where Act Contravened - Discharge - Employer - Interference in Trade Unions - Intimidation and Coercion - Union alleging that when employer learned of certification application, it eliminated all employees known or believed to be union supporters - Parties disputing whether construction company or Indian Band the "employer" - Board finding construction company to be the "employer" and that termination of aggrieved employees tainted by anti-union animus - Union entitled to certification on the basis of membership support in excess of 55 percent and under section 8 of the *Act* - Certificate issuing

GRANT DEVELOPMENT CORPORATION AND/OR THE OJIBWAYS OF PIC RIVER, FIRST NATION (THE PIC 50 - HERON BAY INDIAN BAND); RE L.I.U.N.A., LOCAL 607 21

Construction Industry - Duty of Fair Referral - Remedies - Unfair Labour Practice - Board previously upholding complaint and reconvening on issue of damages - Board concluding that duty of fair referral complainant owing duty to union to mitigate losses, but not obliged to accept referrals as apprentice to fulfill duty - Board also deciding that damages should be reduced because of complainant's unreasonable delay in filing complaint

JAMES N. KRALL; RE C.J.A., LOCAL 785 39

IV

Construction Industry Grievance - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed

ELLIS-DON LIMITED; RE OLRB AND I.B.E.W., LOCAL 894.....

80

Crown Transfer - Bargaining Rights - Ministry of Correctional Services contracting with several community organizations to provide various services to inmates including discharge planning, cultural liaison, and counselling - Whether each contract constituting transfer of part of Crown's "undertaking" to the community agency - Board not persuaded that the right to perform particular services created by subcontract is "part" of Crown's "undertaking" to which bargaining rights attach or which create successorship on execution of contract - Applications dismissed

ST. LEONARD'S SOCIETY OF METROPOLITAN TORONTO, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CORRECTIONAL SERVICES, AND; RE O.P.S.E.U.....

56

Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Natural Justice - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its jurisdiction and breached rules of natural justice - Judicial review application dismissed by Divisional Court

PLAZA FIBREGLAS MANUFACTURING LIMITED, PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE: ONTARIO LABOUR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA ...

83

Discharge - Certification - Certification Where Act Contravened - Construction Industry -

Employer - Interference in Trade Unions - Intimidation and Coercion - Union alleging that when employer learned of certification application, it eliminated all employees known or believed to be union supporters - Parties disputing whether construction company or Indian Band the “employer” - Board finding construction company to be the “employer” and that termination of aggrieved employees tainted by anti-union animus - Union entitled to certification on the basis of membership support in excess of 55 percent and under section 8 of the *Act* - Certificate issuing

GRANT DEVELOPMENT CORPORATION AND/OR THE OJIBWAYS OF PIC RIVER, FIRST NATION (THE PIC 50 - HERON BAY INDIAN BAND); RE L.I.U.N.A., LOCAL 607.....

21

Duty to Bargain in Good Faith - Damages - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Natural Justice - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of *Act* - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union’s negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its jurisdiction and breached rules of natural justice - Judicial review application dismissed by Divisional Court

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83

Duty of Fair Referral - Construction Industry - Remedies - Unfair Labour Practice - Board previously upholding complaint and reconvening on issue of damages - Board concluding that duty of fair referral complainant owing duty to union to mitigate losses, but not obliged to accept referrals as apprentice to fulfill duty - Board also deciding that damages should be reduced because of complainant’s unreasonable delay in filing complaint

JAMES N. KRALL; RE C.J.A., LOCAL 785.....

39

Employee - Certification - Union seeking to represent bargaining unit of salaried “supervisors” - Whether exercising “managerial functions” within the meaning of s.1(3) of the *Act* - Board weighing various factors, including the number of supervisors in relation to subordinates, the exclusivity of the supervisory function, and the variety of circumstances placing supervisors’ duties and obligations at odds with employees they supervise - Board concluding that supervisors not “employees” within meaning of the *Act* - Application dismissed

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1

Employer - Certification - Certification Where *Act* Contravened - Construction Industry - Discharge - Interference in Trade Unions - Intimidation and Coercion - Union alleging that

when employer learned of certification application, it eliminated all employees known or believed to be union supporters - Parties disputing whether construction company or Indian Band the "employer" - Board finding construction company to be the "employer" and that termination of aggrieved employees tainted by anti-union animus - Union entitled to certification on the basis of membership support in excess of 55 percent and under section 8 of the *Act* - Certificate issuing

GRANT DEVELOPMENT CORPORATION AND/OR THE OJIBWAYS OF PIC RIVER, FIRST NATION (THE PIC 50 - HERON BAY INDIAN BAND); RE L.I.U.N.A., LOCAL 607.....

21

Employer Support - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed

ELLIS-DON LIMITED; RE OLRB AND I.B.E.W., LOCAL 894.....

80

Final Offer Vote - Damages - Duty to Bargain in Good Faith - Interference in Trade Unions - Judicial Review - Lockout - Natural Justice - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its jurisdiction and breached rules of natural justice - Judicial review application dismissed by Divisional Court

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83

First Contract Arbitration - Judicial Review - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining and refusing to

provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to subsection 40a(22) of the *Act* - Employer applying for judicial review on ground that the union had ceased to exist and, therefore, lacked the legal status to request conciliation (which was a statutory pre-condition for the Board's decision) - Employer also submitting that that Board committed jurisdictional error in its interpretation of s.40a(22) of the *Act* - Judicial Review application dismissed by Divisional Court - Application for leave to appeal dismissed by Court of Appeal

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206, THE CROWN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), THE OLRB AND SUSAN CATERINA

83

Hospital Labour Disputes Arbitration Act - Termination - Employer seeking to terminate union's bargaining rights for failure to commence bargaining within 60 days of giving notice to bargain - Union not pursuing collective bargaining in a timely manner without reasonable explanation, but continuing to have contact with and pursue grievances on behalf of bargaining unit employees - Board directing representation vote

RIVERVIEW MANOR NURSING HOME; RE O.N.A.

54

Interference in Trade Unions - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Employer - Intimidation and Coercion - Union alleging that when employer learned of certification application, it eliminated all employees known or believed to be union supporters - Parties disputing whether construction company or Indian Band the "employer" - Board finding construction company to be the "employer" and that termination of aggrieved employees tainted by anti-union animus - Union entitled to certification on the basis of membership support in excess of 55 percent and under section 8 of the *Act* - Certificate issuing

GRANT DEVELOPMENT CORPORATION AND/OR THE OJIBWAYS OF PIC RIVER, FIRST NATION (THE PIC 50 - HERON BAY INDIAN BAND); RE L.I.U.N.A., LOCAL 607.....

21

Interference in Trade Unions - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Judicial Review - Lockout - Natural Justice - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its

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83

Intimidation and Coercion - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Employer - Interference in Trade Unions - Union alleging that when employer learned of certification application, it eliminated all employees known or believed to be union supporters - Parties disputing whether construction company or Indian Band the "employer" - Board finding construction company to be the "employer" and that termination of aggrieved employees tainted by anti-union animus - Union entitled to certification on the basis of membership support in excess of 55 percent and under section 8 of the *Act* - Certificate issuing

GRANT DEVELOPMENT CORPORATION AND/OR THE OJIBWAYS OF PIC RIVER, FIRST NATION (THE PIC 50 - HERON BAY INDIAN BAND); RE L.I.U.N.A., LOCAL 607.....

21

Judicial Review - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed

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80

Judicial Review - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Natural Justice - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its

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83

Judicial Review - First Contract Arbitration - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to subsection 40a(22) of the *Act* - Employer applying for judicial review on ground that the union had ceased to exist and, therefore, lacked the legal status to request conciliation (which was a statutory pre-condition for the Board's decision) - Employer also submitting that that Board committed jurisdictional error in its interpretation of s.40a(22) of the *Act* - Judicial Review application dismissed by Divisional Court - Application for leave to appeal dismissed by Court of Appeal

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206, THE CROWN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), THE OLRB AND SUSAN CATERINA

83

Lockout - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Natural Justice - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of *Act* - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its jurisdiction and breached rules of natural justice - Judicial review application dismissed by Divisional Court

PLAZA FIBREGLAS MANUFACTURING LIMITED, PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE: ONTARIO LABOUR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA ...

83

Natural Justice - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent

bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed

ELLIS-DON LIMITED; RE OLRB AND I.B.E.W., LOCAL 894 80

Natural Justice - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its jurisdiction and breached rules of natural justice - Judicial review application dismissed by Divisional Court

PLAZA FIBREGLAS MANUFACTURING LIMITED, PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE: ONTARIO LABOUR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA ... 83

Remedies - Construction Industry - Duty of Fair Referral - Unfair Labour Practice - Board previously upholding complaint and reconvening on issue of damages - Board concluding that duty of fair referral complainant owing duty to union to mitigate losses, but not obliged to accept referrals as apprentice to fulfill duty - Board also deciding that damages should be reduced because of complainant's unreasonable delay in filing complaint

JAMES N. KRALL; RE C.J.A., LOCAL 785 39

Remedies - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Natural Justice - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to

provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its jurisdiction and breached rules of natural justice - Judicial review application dismissed by Divisional Court

PLAZA FIBREGLAS MANUFACTURING LIMITED, PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD. AND SABINA CITRON; RE: ONTARIO LABOUR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA ...

83

Representation Vote - Termination - Whether representation vote should be ordered (and ballot box sealed) pending resolution of issue of timeliness of termination application - Board questioning jurisdiction to order vote in circumstances where timeliness of application undetermined - Board adopting practice in certification procedure (to resolve entitlement issues before directing a vote) and declining to order vote until timeliness issue resolved

SPOONERS' RESTAURANT, EMPLOYEES OF 598142 ONTARIO LIMITED CARRYING ON BUSINESS AS; RE THE R.W.D.S.U., LOCAL 448; RE 598142 ONTARIO LIMITED C.O.B. AS SPOONERS' RESTAURANT

77

Termination - First Contract Arbitration - Judicial Review - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to subsection 40a(22) of the *Act* - Employer applying for judicial review on ground that the union had ceased to exist and, therefore, lacked the legal status to request conciliation (which was a statutory pre-condition for the Board's decision) - Employer also submitting that that Board committed jurisdictional error in its interpretation of s.40a(22) of the *Act* - Judicial Review application dismissed by Divisional Court - Application for leave to appeal dismissed by Court of Appeal

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206, THE CROWN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), THE OLRB AND SUSAN CATERINA

83

Termination - *Hospital Labour Disputes Arbitration Act* - Employer seeking to terminate union's bargaining rights for failure to commence bargaining within 60 days of giving notice to bargain - Union not pursuing collective bargaining in a timely manner without reasonable explanation, but continuing to have contact with and pursue grievances on behalf of bargaining unit employees - Board directing representation vote

RIVERVIEW MANOR NURSING HOME; RE O.N.A.

54

Termination - Representation Vote - Whether representation vote should be ordered (and ballot box sealed) pending resolution of issue of timeliness of termination application - Board questioning jurisdiction to order vote in circumstances where timeliness of application undetermined - Board adopting practice in certification procedure (to resolve entitlement issues before directing a vote) and declining to order vote until timeliness issue resolved

SPOONERS' RESTAURANT, EMPLOYEES OF 598142 ONTARIO LIMITED CARRYING ON BUSINESS AS; RE THE R.W.D.S.U., LOCAL 448; RE 598142 ONTARIO LIMITED C.O.B. AS SPOONERS' RESTAURANT

77

Termination - Voluntary Recognition - Applicant asserting that trade union was not, at the time it entered into a voluntary recognition agreement with employer, entitled to represent employees in the bargaining unit - Board satisfied that results of ratification vote showing

that vast majority of employees in the bargaining unit supported the voluntary recognition agreement and the union - Application dismissed

ONTARIO HYDRO, ROBERT S. HIGGINS; RE ERIC DE BUDA; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES.....

46

Unfair Labour Practice - Construction Industry - Duty of Fair Referral - Remedies - Board previously upholding complaint and reconvening on issue of damages - Board concluding that duty of fair referral complainant owing duty to union to mitigate losses, but not obliged to accept referrals as apprentice to fulfill duty - Board also deciding that damages should be reduced because of complainant's unreasonable delay in filing complaint

JAMES N. KRALL; RE C.J.A., LOCAL 785.....

39

Unfair Labour Practice - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Natural Justice - Remedies - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying for judicial review and submitting that Board exceeded its jurisdiction and breached rules of natural justice - Judicial review application dismissed by Divisional Court

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83

Voluntary Recognition - Termination - Applicant asserting that trade union was not, at the time it entered into a voluntary recognition agreement with employer, entitled to represent employees in the bargaining unit - Board satisfied that results of ratification vote showing that vast majority of employees in the bargaining unit supported the voluntary recognition agreement and the union - Application dismissed

ONTARIO HYDRO, ROBERT S. HIGGINS; RE ERIC DE BUDA; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES.....

46

0710-89-R International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 880, Applicant v. Ford Motor Company of Canada Limited, Respondent v. Group of Employees, Objectors

Certification - Employee - Union seeking to represent bargaining unit of salaried “supervisors” - Whether exercising “managerial functions” within the meaning of s.1(3) of the Act - Board weighing various factors, including the number of supervisors in relation to subordinates, the exclusivity of the supervisory function, and the variety of circumstances placing supervisors’ duties and obligations at odds with employees they supervise - Board concluding that supervisors not “employees” within meaning of the Act - Application dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

APPEARANCES: *Cynthia D. Watson* and *Frank Luce* for the applicant union; *Daniel J. Shields* for the respondent employer; no one appearing for the objecting employees.

DECISION OF THE BOARD; January 4, 1993

I

Introduction: What this case is about

1. This is an application for certification in which the union seeks to represent a bargaining unit composed exclusively of salaried “supervisors”. The union has enrolled a number of these supervisors into membership, and seeks certification as their bargaining agent.

2. The company replies that these supervisors exercise “managerial functions” within the meaning of section 1(3)(b) of the *Labour Relations Act*, and therefore are not “employees” within the meaning of the Act. Section 1(3)(b) reads as follows:

1.-(3) Subject to section 92, for the purposes of this Act, no person shall be deemed to be an employee,

...

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The company submits that because these supervisors are not “employees” under the Act, they cannot engage in the collective bargaining process regulated by the Act, nor can the union be certified to represent them.

3. The union concedes that if the supervisors are indeed “managerial”, this application must be dismissed. However, the union maintains that the supervisors do not really exercise “managerial” functions. In the union’s submission, their co-ordinating and supervisory duties do not involve any significant authority over their fellow employees, and they are, at most, a conduit of information to the “real managerial authority”, which rests at higher levels of the company’s organization.

4. In accordance with its usual practice, the Board appointed an Officer to inquire into the duties and responsibilities of the disputed individuals. That enquiry consumed some fourteen days.

and resulted in an eight-volume transcript, comprising almost 2,000 pages of testimony and related exhibits. This material was later supplemented by written representations, in which the parties outlined the conclusions that they urged the Board to reach on the basis of the evidence in the transcript, and put before the Board the decisions said to be relevant to the issues in dispute. The parties elaborated those submissions at a hearing before the Board held for that purpose.

5. We should note that although the Canadian Autoworkers Union (“CAW”) was given notice of these proceedings, the CAW did not appear or participate. The CAW represents the 600-700 hourly-rated employees whom the disputed individuals “supervise”. These hourly-rated employees are covered by a collective agreement, from which the “supervisors” are excluded.

* * *

The Legal Setting: What section 1(3)(b) is for

6. Before turning to the facts of this case, it may be useful to sketch in the legal and policy framework within which the parties’ rights must be determined. The purpose of section 1(3)(b) has been summarized in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, at para. 2:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor its members will have “divided loyalties”. This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] 1 CLRBR at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm’s length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for “cause” or passed over for promotion on the grounds of their “ability”. The employer does not want management’s identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way

this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

7. The division and potential collision of interests that was discussed by the B.C. Board in *District of Burnaby* is also a reality of the collective bargaining environment in Ontario, and as in B.C., the Ontario statute tries to balance these competing concerns, so that promotion of the rights of one group of workers will not unreasonably circumscribe the rights of others. The statute provides that "every person is free to join a trade union of the person's own choice and to participate in its lawful activities" (section 3 of the Act), and declares that "it is in the public interest of the Province of Ontario to further harmonious relations between employers and *employees* by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of *employees*" [emphasis added]. However, section 1(3)(b) of the Act excludes from collective bargaining activity, persons who are members of management. And it does that in order to protect the institutional interests of both employers and unions.

8. It is easy to understand why an employer would want "its" management excluded from union involvement. From a purely economic point of view, an employer is unlikely to welcome the additional pressure which collective action by its "foremen" might involve. Unions press demands which increase the cost of doing business, and a "union" of "foremen" is unlikely to be much different.

9. However, quite apart from these economic considerations, the unionization of persons whom the employer considers its "first line management" would significantly affect the way in which the business is run, because "managerial" employees have qualitatively different obligations to the company, and a different role vis a vis their fellow workers. The employer's "foremen" are its eyes and ears on the shop floor. They are the persons whom the employer expects to promote *its* interests, even if that duty conflicts with the interests of other employees or the union that represents those employees.

10. Managers are expected to manage: to monitor and correct employee performance, to encourage employee productivity, and to ensure that employees adhere to workplace rules. Management controls the system of rewards and penalties by which the workplace is regulated, and may resort to those rewards or penalties to maintain employee cooperation. The employer needs to know that those administering that system will do so with the objectives of the enterprise in mind. There is no room for divided loyalties either at the bargaining table or in the workplace.

11. From a union's perspective, there is also a value in clearly identifying and separating the two "sides". In a system of institutionalized collective bargaining and latent conflict, the union is always poised to challenge the exercise of management authority; and the first level of management is often the point of contact between two potentially conflicting interest groups. The union needs to know where the line is drawn, and benefits from a clear delineation of loyalties and responsibilities. For example, a union is obliged to fairly represent all employees for whom it is the bargaining agent, and might find itself in difficulty if the "grievance" of one of its members arose from the actions of others, acting on behalf of the employer. From a collective bargaining point of

view, “managers” - even first level “foremen” - are the agents of the employer, who are required in the ordinary course of their duties to direct, reward or penalize employees for whom the union is bargaining agent. They are on the employer’s side of the bargaining table.

12. This potential conflict of interest is not a theoretical abstraction. Managerial personnel really are different from their fellow workers, and that is well recognized by both “ordinary employees” and the unions that represent them. In the instant case, for example, the CAW collective agreement provides that if a worker has a grievance s/he “may present it in writing to his/her *supervisor* or superintendent on forms to be supplied by the company...” and the “*supervisor* or superintendent shall deal with the grievance and shall deliver his/her decision in writing as soon as possible...”. Similarly, if a “supervisor” is involved in an interview or investigation that may give rise to discipline, the hourly-rated employee is entitled to have *separate* trade union representation during such discussion. The “supervisors” mentioned in this clause are the persons whom the applicant union seeks to organize.

13. We will have more to say about the existing collective bargaining relationship below, because the reality may be somewhat different from what is suggested by this contractual framework. At this stage, we note only that the CAW collective agreement recognizes that “supervisors” are different: they are persons, representing the company, whose interests may conflict with those of hourly-rated employees.

14. In addition to the obvious examples of conflicting interests on the shop floor, there are broader, systemic concerns which require the exclusion of “management” from participation in trade union activities. For if management personnel were treated like ordinary employees, and were free to organize or promote particular trade unions, the freedom of these *other workers* could be undermined and the independence of *their trade unions* could be jeopardized. And this problem may not be resolved merely, as here, by segregating the “supervisors” into their own bargaining unit.

15. Unless the alleged “managerial” personnel really *are* like other workers, and really *do not* have any significant authority over their fellow employees, nothing prevents them from using their influence *against* those workers or their union. If “managers” - even lower-level ones - were part of the collective bargaining mix, it is difficult to see how one could avoid the problems to which Board Chairman Weiler referred in the concluding paragraphs of the passage from *District of Burnaby*. Once someone is declared to be an “employee” under the Act, s/he has the same rights as other “employees” - including the right to promote or oppose a trade union and to try to influence other “employees” in that regard. As the Board observed during the hearing: if “foremen” had the same rights as other employees, what would prevent them, acting in their own interest, from trying to persuade those other workers to join, support or discard a particular union? In the instant case, for example, if the “supervisors” are “employees” like the persons they supervise, would they not be entitled to try to persuade their fellow “employees” to oust the CAW or join the applicant? If they are merely “employees” like the others, could they not form their own union, and “encourage” their subordinates to join? During an organizing campaign, would they not be entitled to mobilize “employee” opposition to the applicant union? Section 1(3)(b) not only defines who is *excluded* from the collective bargaining process; it also identifies who is *prevented* from using “managerial” authority to interfere with the collective bargaining rights of others.

16. This is not an academic concern either. What distinguishes “management” from ordinary “employees” is the *power* that managers exercise over the economic security of their fellow workers - a power which, in the Board’s experience, “foremen” have sometimes used to interfere with the right of those workers to engage in collective bargaining through a trade union of *their*

choice. The rewards and penalties which are the instruments of management control can easily be applied to influence employees to join or reject a particular trade union. The fact is (and the cases demonstrate), that foremen occasionally do promote opposition to unions at the organizing stage, do sponsor the termination of an incumbent union's bargaining rights, and do influence employees in favour of unions or associations more congenial to the employer's interests. That is why section 1(3)(b) is but one of a constellation of statutory provisions designed to segregate "employees" from "management", and ensure that the employees and their unions are entirely independent of managerial influence.

17. This is not to say that lower levels of management do not have concerns that are similar to those of rank and file employees, or that they would not benefit from the enhanced bargaining power that collective bargaining would bring. On the contrary. Managerial employees might well benefit from a protected right to collective action, or from the institutionalized checks and balances that collective bargaining provides. Collective bargaining might well be a useful tool for managerial employees, just as it is for ordinary workers. However, the Legislature has determined that the process is better served if those obliged to act on behalf of the employer are completely segregated from the union institutions and the collective bargaining mechanism that employees use to promote their interests.

II

The Board's Approach to the Application of Section 1(3)(b), in general, and in this case

18. Section 1(3)(b) has been in the statute in its present form since 1957 and, as we have already noted, its purpose is relatively easy to articulate. The difficulty is, and always has been, to give practical content to the words "managerial functions", and to apply them to the host of different work settings to which the *Labour Relations Act* applies. In *The Corporation of the City of Thunder Bay*, *supra*, the Board outlined its approach in a long passage to which we might usefully refer:

3. *The Labour Relations Act* does not contain a definition of the term "managerial function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the results in every situation, and in assessing each case, the Board must have due regard to the nature of industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function

can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced persons will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the management line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall* case above referred to, titles alone are not much assistance in determining what a person's functions really are...

The cases cited above would seem to indicate that while a person may have minor supervisory functions or very limited confidential functions in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b)).

6. It should always be remembered, however, that *The Labour Relations Act* is intended to extend collective bargaining rights to employees, and it is incumbent upon any party seeking to exclude employees from the scheme of the Act, to come forward with affirmative evidence that they exercise managerial functions. (See: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283 at paragraph 11; and *Bakery and Confectionery Workers International Union v. Salmi*, 56 DLR (2d) 193.) Furthermore, (and in addition to the usual rule that "he who asserts must prove"), a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position.

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7. We can summarize these general approaches then, as follows:

- (1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.
- (2) A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.

• • •

- (4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman", so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to

which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.

- (5) The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it *is* necessary to show that his recommendations are *really* effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide *concrete examples* of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available at all, or when examined closely, amounts to no more than a "participatory decision-making style". Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.

19. That is the approach which we have taken in the instant case.

20. Obviously, it is neither necessary, nor possible, to reproduce in these reasons the mountain of evidence (oral and documentary) contained in the Officer's Report. Instead, we will try to sketch in a general overview, emphasizing, with some examples, those features of the evidence which "tip the balance" and influence our opinion as to where the managerial line should be drawn in this industrial setting.

21. We might note at the outset, however, that in forming our opinion, we have taken into account both the substance of the witnesses' testimony and their particular perspective in this proceeding - bearing in mind that some of the witnesses were "partisan", and had a clear preference for one or other of the two conclusions open to us. In this regard, the documentary evidence was particularly helpful, because it originated prior to the commencement of these proceedings, and before anyone had considered how the supervisors' duties should be considered under section 1(3)(b). The "paper trail" helps to put in perspective the sometimes conflicting testimony of the various supervisors.

22. We have also taken into account the fact that, by definition, the "first level" of management will be at the bottom of the managerial hierarchy, closely controlled from above; and, in a large organization, all members of management - but especially first-level "foremen" - will operate within a framework of rules which limit the exercise of independent discretion. That is especially so in a unionized setting, where the rights of employee subordinates are carefully spelled out in a collective agreement. (The CAW agreement has 434 pages.) In a unionized workplace, the institutionalized review of managerial decision-making created by collective bargaining means that the final decision will almost never rest with the first level of management. Some of the supervisors are clearly irritated that they do not have a more decisive authority over those reporting to them, and tend to minimize the weight given to their input and resist the label "managerial". But the absence of decisive authority does not mean that there is no authority at all. Like a police officer on the beat, "foremen" monitor what is happening around them, influence results by their presence or direction, and initiate action which is ultimately reviewed by higher levels of authority. But no one would suggest that a police constable was not part of the "state apparatus" merely because his/her decisions were reviewable or reversible.

23. Finally, it is important to note that the way in which the various supervisors conceive

and carry out their role, is influenced by their own personal styles, their experience, and their areas of responsibility, so that there may be considerable differences in the extent to which particular supervisors choose to coach, counsel, correct, or castigate the employees reporting to them. For an experienced supervisor, documented discipline is unlikely to be foremost in the mix of managerial techniques, yet managerial authority may exist even though its exercise is infrequent. The power of choice - to initiate action or "let something go" - is itself an indication of managerial status. It is necessary therefore to consider the evidence as a whole, weighing both symbol and substance in light of the statutory purpose section 1(3)(b) was designed to accomplish.

* * *

The evidence: An overview with examples

24. Ford is a well-known manufacturer of motor vehicles, with several production facilities in the Province of Ontario. The 34 salaried supervisors who are the subject of this application work at the company's Essex aluminium plant in Windsor. The Essex aluminium plant is a three-shift operation. There are about 650 hourly-rated employees who report to the supervisors whose status is here under review. The hourly-rated employees are represented by the CAW.

25. There is not much doubt that the hourly-rated employees would regard their supervisors as their "boss" - that is, part of the "management team" and the agent of the employer on the shop floor. Not only are the hourly-rated employees under the immediate direction and control of their supervisors, but, as we have already mentioned, the CAW collective agreement recognizes that there is a reporting relationship. Under the terms of that collective agreement, employee grievances may be directed to the supervisors (Article 11) who are excluded from the bargaining unit (Article 2), and complaints about production standards are to be taken up with the supervisor, who is obliged to answer within two working days (Article 30.04). When an employee is being interviewed by a supervisor in a context in which discipline may be imposed, that employee is entitled to have his steward present - clearly recognizing the potential conflict between the supervisory role and the interests of the employee (Article 14); moreover, interviews of this kind do happen. Even though the terms of the agreement may not always be adhered to, it is clear that, from the perspective of the CAW employees, the supervisors are an extension of management. To put the matter another way: the structure of the *existing* collective bargaining relationship suggests that the supervisors exercise managerial functions. To the extent that the existing bargaining relationship establishes a reference point, it points to a finding that the "supervisors" are "managerial".

26. The supervisors do not do "bargaining unit work" - that is, they do not perform the duties of the persons whom they supervise, and who, for present purposes, are admitted to be "employees" within the meaning of the Act. This is not a case of overlapping functions or mixed responsibilities as in *Falconbridge, supra*. All of the supervisors' time is spent "supervising". The union in this case cannot claim that supervisors must be "employees" under the Act because they do work that is similar to persons acknowledged to be "employees". They do not; and that fact supports the opposite inference.

27. According to Jim Chandler, the company's labour relations representative, the "managerial" hierarchy includes 34 supervisors and 12 persons above the rank of supervisor. That is the pool of potential "managers" from which the applicant union seeks to separate 34 individuals, whom it says, do not exercise managerial functions at all. Thus, if the Board were to conclude that the 34 supervisors were not part of the managerial team (i.e., that they did not exercise functions within the meaning of section 1(3)(b) of the Act), the plant would have 12 managerial personnel for a workforce of approximately 700 - a ratio of about 60 to 1. And because almost all of the 12 remaining managers work steady days, while the hourly-rated employees work rotating shifts,

there would be substantial periods of time when the plant would be in operation with no “managerial” employees on the scene at all. There would be no one on site to monitor production standards or work performance, maintain discipline, enforce plant or safety rules (see Exhibit 42 below) and so on. Conversely, if supervisors are part of the management team, the superior/subordinate ratio would be about 14 to 1 - in the Board’s experience, a more typical arrangement for industrial operations.

28. There is, of course, no magic ratio of “managers” to “employees”, and the interpretation of section 1(3)(b) is not an arithmetic exercise. However, the organizational subdivision proposed by the company is more in keeping with what one would expect in an industrial plant, while the one proposed by the union is unusual. It is difficult to accept that large numbers of employees work without any immediate “managerial” supervision, or that “managerial” authority flows exclusively from absentee bosses working in the industrial relations department.

* * *

29. The employer’s job descriptions give a general outline of the duties that supervisors are expected to perform. An example from the Quality Control area reads as follows:

“Supervises hourly-rated employees engaged in inspecting, checking and testing quality control gauges, checking fixtures, die models and instruments used to verify dimensional and functional accuracy; performs lay-out inspection of parts or tooling for conformance to specifications. May also supervise hourly-rated employees engaged in general inspection activities. Evaluate tool and die try-out results and may recommend corrective measures, advises effected production and engineering personnel on the performance of gauges and fixtures, and may recommend changes based on analysis of recurring problems. Coordinates and schedules manpower requirements, ascertains that equipment is operable and performing in accordance with requirements, identifies and ensures that potential safety hazards are corrected, arranges for routine and emergency repair of equipment, and the like. Maintains discipline in accordance with company practices, participates in the settlement of grievances, enforces work standards, provides on-the-job training, and administers other personnel functions within the framework of established practices and policies. Prepares and maintains miscellaneous reports and records. Performs related duties as required”.

This document was compiled many years ago, but is still a fairly accurate summary of what the supervisor in this area is expected to do. Basically, they are to supervise and coordinate the work of employees reporting to them, make sure that the work performance of those employees meets company standards, and ensure compliance with workplace rules.

30. As might be expected in a large organization, there are detailed standards and work rules to which employees are expected to adhere. Exhibit 42 summarizes the rules of personal conduct. It reads as follows:

FORD MOTOR COMPANY OF CANADA LIMITED

PERSONAL CONDUCT

Over a period of time it has been found necessary to establish and to enforce a number of rules for the safety and comfort of employees, to ensure the orderly and efficient conduct of the company’s business, to protect its property and the property of its employees, and to comply with public laws.

Employees are required to comply with these rules at all times when on the company’s premises and failure to do so may result in suspension or discharge.

Any employee committing any of these offences will be subject to disciplinary action:

1. Gambling, including operation of pools, raffles, punch boards, etc.
2. Horseplay, throwing articles, scuffling and fooling.
3. Using abusive language.
4. Fighting.
5. Running in any building.
6. Posting or distributing signs, cards, notices, etc., and soliciting of any kind without obtaining permission from the company.
7. Sleeping.
8. Loitering or leaving work place for the purpose of washing up prior to regular quitting time.
9. Smoking in restricted areas.
10. Repeated failure to meet established standards of production.
11. Leaving company premises during working hours, except in the regular course of duty, without a properly approved pass.
12. Drinking an intoxicating beverage on company property.
13. Intoxication.
14. Attempting to bring or having on company property an intoxicating beverage or narcotic drug.
15. Insubordination.
16. Refusal to perform work assigned by a foreman or other supervisor.
17. Refusal or failure to obey safety rules.
18. Carelessness resulting in injury or property damage.
19. Deliberately punching the clock card of another employee.
20. Attempting to erase or change the time recorded on a clock card.
21. Theft or dishonesty.
22. Wilful damage to property of the company or property of other employees.
23. Absence or tardiness without notification or valid excuse.
24. Chronic absenteeism.
25. Chronic loafing.
26. Sitting in company cars and trucks during rest periods and lunch hours or using company vehicles for any purpose without permission.
27. Indecency.

Supervisors are expected to report on or “write up” employees who do not comply with these requirements; and that is what they do.

31. The supervisors are immediately responsible for: the assignment of work, ensuring that there is an adequate employee complement at work, monitoring the employees’ work and the quality of their production, the assignment of employees for training, aspects of employee training, education and health and safety awareness, and some time-keeping functions to ensure that employee pay cheques match their hours or non-work entitlements. From the supervisors’ perspective, “their employees” report to them.

32. The supervisors have a number of the trappings of office ordinarily associated with managerial status. Supervisors work out of lockable offices which they share with other supervisors and, in a number of cases, are kept locked by the supervisors who use them to restrict employee access. Several supervisors identified information which they kept locked in their offices or in locked desks so that the information would remain confidential. This information included: employee “write-ups” (disciplinary notations), tests given to assess employee performance; and log books containing supervisors’ notes to each other about issues or employees in the workplace or instructions from higher levels of management which the supervisors are expected to implement. Ordinary “employees” do not have or work in offices.

33. The supervisors have computer access to records not available to ordinary workers, including, for example, the absentee records of those workers, as well as a variety of other employment-related data. This information is not particularly significant in itself, because it would be known to the employees or certain office personnel. What is significant is the right of access and the potential use of this information to track employee behaviour. Similarly, supervisors have asked for and been given access to the disciplinary records of employees reporting to them. Ordinary employees do not have this kind of access nor any need for it.

34. Company training initiatives directed at the supervisors involve them as part of the management team, and touch on such things as their responsibility in areas of production, labour relations, employment equity, affirmation action, safety rule enforcement, etc. These are employee concerns too, but from the supervisors’ perspective, the responsibilities are different. The benefits available to supervisors are different from those available to hourly-rated employees, both in quantum and structure. There are a number of benefit items which are either not available to hourly-rated employees and salaried bargaining unit personnel, or which have different features (the merit pay plan, profit-sharing plan, stock investment plan, property and automobile insurance plan, retirement pension plan, health and welfare benefits). In other words, the supervisors appear to have a “management” benefit package.

* * *

35. Because of the size and complexity of the employer’s operation, and the fact that it has been unionized for many years, many of the traditional indicia of managerial control have been muted or partitioned, with ultimate authority over labour relations decisions in the hands of industrial relations specialists rather than line management. The collective agreement has an elaborate seniority-based framework for lay-offs, recalls, promotions, transfers, filling vacancies, hiring, wage increases, and progression along the wage grid. The supervisors do not have any decisive role in these areas. The supervisors sense, correctly, that a CAW representative may have more immediate impact than they do themselves, and even in cases where they initiate discipline, the ultimate disposition may depend upon decisions and compromises made by others. We will explore this disciplinary function later.

36. Ordinarily, the supervisors are concerned only with existing production employees; they have no role in hiring. Likewise, there is no provision in the CAW agreement for periodic performance reviews; and, accordingly, neither the supervisors nor anyone else conduct performance evaluations on permanent employees. The supervisors do monitor and evaluate workers on a daily basis to ensure compliance with workplace norms and production standards, but there is no formal system of performance evaluations. Interestingly, supervisors are themselves evaluated on a scale which includes references to employer-employee relations. For example, the salaried personnel performance appraisal for R. A. Kenney includes these remarks under the heading "Tasks and Projects" followed by "Comments on Performance":

"Educate and supervise hourly personnel in day to day activities and the successful implementation of the EAP quality system ... Mr. Kenney's supervisory techniques require effort on his part to bring up to today's participative standards. Counselling in this area over the last year has not been effective".

"Maintain department manning and discipline. Coordinate schedules, shift changes and vacations ... Mr. Kenney does an excellent job of discipline. However, he does not effectively coordinate schedules and shift changes with other shifts. Again, communication needs to be improved".

37. Some of the supervisors have undertaken evaluations of probationary employees or students which have influenced whether they are retained in employment. In one instance (Lawlik), a supervisor's adverse review prompted a discussion with Jim Chandler, the company's labour relations representative, and resulted in that employee's termination. Mr. Chandler testified that supervisors are expected to complete employee evaluations within thirty days of the new employee's start date. If the evaluation is positive, the employee is retained; if it is negative, the employee is discharged. The evaluation form for new employees requires the supervisor to assess the following factors: "safety and safe practices, dependability (on-the-job performance), attitude (interest in job), initiative (does he look for work to do), interest (does he try to learn), adaptability (ability to learn), quality and accuracy, quantity of work (does he make use of idle time), attendance".

38. Obviously, these employees are either newcomers to the workplace or have a more tenuous attachment to the bargaining unit than other employees, and presumably, a worker would not have been hired in the first place if s/he had not passed the initial screening and had a reasonable prospect of success. Accordingly, one should not attach too much weight to the "evaluation" of these kinds of workers. However, ordinary bargaining unit employees do not undertake this kind of review. It is a "supervisory" function which the company submits is "managerial" in nature, and is therefore indicative of the role its supervisors play.

39. As we have already mentioned, the supervisors as a group are directly responsible for the coordination of work at the plant, and within their own departments they are responsible for such matters as: the shift changes and rotation schedule; the filling of temporary vacancies; the granting of approval for shift switches; the alteration of shift times; and the reassignment of employees. No doubt, most of these arrangements are entirely routine, and are triggered by circumstances over which the supervisor has no control. They are worked out in accordance with established procedures and may often be merely rubber-stamping accommodations that employees are able to work out among themselves. However, the sheer volume of these changes (as evidenced in the supervisors' logs) indicates the extent to which supervisors are involved in juggling the employees' work schedules to ensure adequate coverage to meet production needs. And the exercise of such responsibilities sometimes generates the kind of friction with employees that suggests that the functions are of a "managerial" character within the meaning of section 1(3)(b).

40. This is not to say that the workplace is fraught with bickering and conflict. Clearly it

isn't. But where decisions and choices of this kind are to be made, it is the supervisors who are obliged to make them.

41. Supervisors were generally agreed that they had the authority to grant casual time off without approval, but they disagreed as to the maximum length of time that they could independently authorize; and, of course, they were ultimately responsible for ensuring adequate coverage if a worker was permitted to leave. It is the supervisor who often decides if the employee can be spared. To the extent that permission is conditional upon finding qualified substitutes, the supervisors make those assessments of ability. The majority of supervisors indicated that they could grant time off of up to one day, although Jim Chandler testified that they could sometimes give more time off.

42. Some forms of time off with pay such as bereavement leave or jury duty require documentation from the supervisor, but these items are prescribed by the collective agreement so it is rather difficult to say that, in these cases, the supervisor is "authorizing" this kind of leave. It is a verification function which the payroll department then acts on. But the holiday pay authorization form (necessary if an employee was otherwise absent) contains the phrase "I am satisfied with the reason given and recommend he be paid for the holiday". This notation is necessary because the CAW collective agreement provides that an employee absent on the last scheduled workday prior to the observance of the holiday will not be paid:

"... unless the employee is able to provide his/her supervisor with satisfactory reason for his/her failure to qualify under this section. (Any dispute in this respect will be subject to the grievance procedure.)"

The supervisor's decision is a condition of payment and may be the subject of an employee grievance.

43. Before an employee can leave the plant for any reason, the supervisor must first issue a "pass" which authorizes the worker to leave without penalty. Departure without a pass exposes employees to discipline. A number of supervisors testified that they have told bargaining unit employees that they could *not* take time off as requested.

44. Unless there is an overtime freeze in effect, most of the supervisors indicated that in their own departments and within the confines of the collective agreement, they have a degree of independent discretion in the scheduling and assigning of such overtime as is necessary to meet production needs. For employees, these overtime opportunities represent the chance to earn extra money, and according to Mr. Chandler, the supervisor's selection is frequently the subject of employee grievances. Such grievances against the supervisor's decision would trigger an investigation in which both the union and Mr. Chandler could be involved. Normally, they are readily resolved, but if the dispute persisted and went to arbitration, the supervisor would attend the hearing to give evidence on the employer's behalf. As an example, supervisor Kenney's response to one employee grievance over a lost overtime responsibility was: "I guess I missed him, pay it, it's only money"; and the company paid 8 hours at double-time rates.

45. Several of the supervisors confirmed that grievances had been filed against them, and that they had been involved in their subsequent resolution. For example, in Exhibit 107, employee Prokopetz grieves that the supervisor Conn has wrongly denied him an overtime opportunity to which he is entitled. Conn replies that the grievor is unable to perform the work in question, and the company ultimately rejected that grievance. Exhibits 183, 184 and 209 are similar complaints in which employees, supported by their union stewards, are protesting the way in which overtime is allocated in their departments.

46. The disposition of these grievances is less significant than the fact that employees were prompted to bring them. If the supervisor's allocation of overtime results in benefits for some employees and not others, which, in turn, prompts employees to complain through their union, it suggests that this allocation function is "managerial" in character, as that term is used in section 1(3)(b). It is not mere "coordination" and demonstrates the kind of potential conflict which section 1(3)(b) was designed to meet.

* * *

47. The log books are the means by which supervisors communicate with each other from shift to shift, and by which higher levels of management communicate to supervisors about how they are to handle their subordinates. These log books are not generally available to rank and file employees, and because senior management are not on site for extended periods of time, the log book becomes one means by which instructions are passed down from above. The instructions, in turn, illustrate what the supervisors are expected to do on the job.

48. Much of the contents of these logs (as illustrated by the samples filed) involves production matters, safety concerns, quality control problems, things to watch out for or correct (including employee errors) and changes in the anticipated staff complement which the oncoming supervisor is expected to accommodate (shift trades, absences, employees reporting late, etc.). Many of the notations therefore do not suggest activities of an unequivocally managerial character - although they reinforce the fact that employees are under the supervisors' immediate direction and control. However, this coordination function is not the passive recording of events or employee preferences, as these notations illustrate: "Bill ... no show ... if you don't want S in at seven, call him ... he was the only one I could get to start early"; or, "coverage needed for W Wednesday and Thursday", or "AP will be off Tuesday ... need overtime coverage", or "There is quite a bit of controversy over B's double trade, you may get some inquiries". Supervisors are required to take action to ensure proper staffing.

49. The control of staffing and absenteeism is a constant preoccupation which sometimes generates controversy, produces continuous demands for overtime authorization and distribution, and in turn may involve pay claims which the supervisors are obliged to verify. There are numerous examples of minor pay disputes of this kind which are sometimes resolved in the employee's favour and are sometimes not. But again, this involves the supervisors in interactions with payroll and labour relations.

50. It is clear that the supervisors are directing the daily work of employees in accordance with shifting policies emanating from above, or negotiated with the CAW. On the other hand, the log books contain missives from fellow supervisors or senior management like these:

"I cannot approve the leave of absence for D since there are no dates on it. Please don't sign them and pass them on unless we know exactly what days you want to give him leaves for".

"Especially disturbing are the notes made after I left last night on the lab sheet about cigarette butts in the sink and coffee spilled on the floor and left there. Please handle these issues".

Please go back to enforcing the hearing protection and the proper gloves being worn for various jobs. We are slacking off in this area again. I guess they need constant reminding".

"No one has seen W for the entire week since Monday. I left him a note about three things ... phoney note from doctor's office to be checked out *before* we write discipline - it says sick on 29th, okay to return to work 29th, and cannot work 29th, and is dated 29th all of which is stupid ... another probable phoney note with the date changed in different ink from others. I asked Paul to check that one out too before we pursue disciplinary action ...".

"I counselled Mr. A on AWOL problem yesterday afternoon. I do not think this is ever going to happen again. If it does, he knows clearly the consequences ...".

"If you feel it necessary to send an employee home due to intentional quality transgressions, call Jim Chandler (at home - anytime) for his advice and/or direction".

"Please check all time cards for "no punch", *in* or *out*. Assessment of a penalty of .1 hours is now to be taken care of by the supervisor as time-keeping is not auditing the cards".

"Please advise Mr. F he is being written up for leaving the plant without permission".

"Employees leaving the plant without a pass is now and will continue to be a major issue. Anyone leaving the plant other than shift change must have a pass. If an employee is caught leaving without a pass and security issues a report, the supervisor has no say about the issuance of the security report nor does he have the option of a labour relations write-up. The write-up is to be automatic. It does not matter if a supervisor says he would have issued a pass; the fact is there was no pass. Also if employees are caught without the pass, this says the supervisor was unaware of his employee's time on the job".

"Jim Chandler, the new labour rep has told us that any shift especially 1, 2, 3 shifts, should call him at home if you have a labour problem of any nature which needs advice or help from labour relations. ... Also, with anyone who has been drinking especially at this time of year but, any time, and you need to get them out of the plant, offer to have security take them home and offer to call a cab. The plant is liable for any injury to a drunk person who was not offered alternative means of getting home safely".

"C and D are AWOL - not on vacation - [unreadable] warrants a write-up for so much time off".

"Time off the job is the supervisor's job to control and the cleaning room is not being controlled. Today, Friday, at 1:50 p.m., no one except (?) was around ... rest of the line started trickling back between 2:20 and 2:30 ... forty minutes minimum break ... here it is plain and simple ... No. 1: I am instructing each supervisor to keep the men on the job right till the very end of the shift. When breaks and lunches become more responsible, I might back off on this ... any supervisor who does not care to attempt to maintain some reasonableness to time off the job by their people *will* receive a formal written reprimand in their jacket. I've done it before and I can do it again. It's no use blaming anyone else or looking for someone else to do the job. The question comes back, "What are *we* (you and I) *trying* to do about it". Absolutely no one can excuse or condone this much time off the job".

"Anyone off the job and you have not given him permission you *are* to write them up for loitering. This includes anyone going to First Aid without your knowledge unless an emergency. You are *not* to look for them. ... The question has been asked what are we (you and I) doing to control our people. Well, we'll put the responsibility right where it belongs".

"The [job classifications] are leaving the area under the belt and total area a damn mess. They sit on their tails at the start of the shift and the end no chores are coming. I want those birds *on the job* and cleaning up too. ... Get it corrected. Start now".

51. These notations indicate that ensuring employee compliance with workplace norms is a shared responsibility, involving supervisors, senior levels of management, the labour relations department, and, sometimes, plant security. But there is no doubt that the supervisors are expected to perform this enforcement function and, for that purpose, are regarded as an extension of management. They monitor employee behaviour, and respond to infractions by initiating discipline. Indeed, if the supervisors do not pursue these admonitory responsibilities, they will themselves be subject to discipline.

52. The "write-ups" referred to in the log book are written disciplinary notations which the supervisor issues to employees on a form entitled "Foreman's Record of Disciplinary Action".

These steps can be initiated by the supervisors themselves, or at the instruction of more senior members of management; however, the supervisors testified that they would normally try to counsel an employee before taking formal disciplinary action - incidentally indicating that they have a degree of discretion in this regard. To some extent the supervisors decide when behaviour (absenteeism, for example, or insubordination) is sufficiently unacceptable to warrant initiating disciplinary action.

53. All of the supervisors said that they had independently issued these “disciplinary write-ups” to bargaining unit employees. The reasons for doing so are varied: insubordination; leaving the plant without permission; poor work performance/failure to perform duties; unsatisfactory attendance; loitering/sleeping on the job, etc. The write-up can be and often is the subject of employee grievance.

54. Supervisors have sent employees home if they were unfit to work. One supervisor testified that he sent an employee home without need for prior approval as a result of insubordination. Another supervisor sent someone home because of a threat made to him by that employee. Jim Chandler testified that supervisors had the independent authority to send workers home - particularly on the off shifts where other “managerial” personnel are not around. Certainly, when an employee is told to punch out, leave the plant and report to industrial relations in the morning (to which, in one example in the transcript, the employee replied “not without talking to my steward”), the person giving that direction appears to be exercising managerial authority.

55. Some of the supervisors testified that they would consult with or be consulted by the Industrial Relations Department when dealing with employee problems, and it seems clear that they are also encouraged to consult in any situation which may give rise to union involvement or generate a labour relations problem. The log book entries set out above include a reference to calling Jim Chandler at home if problems arise on the off shifts. Accordingly, it is somewhat difficult to ascertain the degree of independent influence that the foreman has in the ultimate disposition of these incidents, because the formal disciplinary procedure guarantees union input and independent review by more senior levels of management. But in these interchanges with employees, it is pretty clear what “side” the supervisors are on: they are an extension of management.

56. Supervisors are consulted about the facts of the case and are sometimes consulted about the proposed penalty, and according to one supervisor, his recommendations are generally followed; moreover, supervisors engage in disciplinary interviews where union stewards are present to advise the bargaining unit employee. Supervisors also typically deliver the ultimate notice of warning or suspension (just as they typically deliver employee pay cheques) which, while symbolic, is consistent with other symbolic indications of authority. Supervisors have asked for discipline to be withdrawn and generally that has been what happened, and of course, supervisors can choose not to issue formal write-ups in the first place. Some supervisors indicated that they would warn an employee several times before doing a write-up, because that initiates a disciplinary process. However, there is no doubt that the write-ups are routinely reviewed by labour relations personnel who have the authority to revise or disregard the supervisor’s decision, and in more serious cases, labour relations undertakes its own investigation in which the supervisor’s input plays only a part. In addition, discipline must be carried out within the established framework of past practice to ensure that it is “progressive” and consistent with company norms. Because of the size of the workforce and the maturity of the collective bargaining relationship, precedent largely determines the employer’s response or the penalty to be imposed. Once formal discipline is imposed, it remains on the employee’s record and can be referred to in the event of a future disciplinary incident.

57. Since the identification of a “management” function involves a question of characterization, and the union here claims that the supervisors are mere “conduits”, it may be useful to examine some concrete examples of these disciplinary “write-ups”. The Record contains literally dozens of them, together with supporting documentation of the company’s follow-up and disposition. When this evidence is viewed as a whole, it is evident that the supervisors are not mere passive observers or “note takers”. They are active participants in initiating the disciplinary process, even though their role is subject to review by labour relations personnel; moreover, the frequency of these documents for a variety of supervisors and employees indicates that this is an important aspect of their overall duties.

58. The sheer volume of these disciplinary notations signed by supervisors tends to undercut the testimony from some of them that there is no follow-up, no consultation and that they wouldn’t even know what discipline is actually imposed, or why. That may well be so in some instances, and we do not suggest that the supervisors’ input is always decisive or even sought. Senior management may be content to proceed on the supervisor’s statement of the facts, conducting its own investigation and making such compromises with the union as appear to be appropriate to the time and circumstances. But neither should one minimize the supervisor’s role in initiating the disciplinary process or supplying the factual foundation upon which the employer must act.

59. The Record is, in fact, replete with examples of this disciplinary involvement. In Volume I alone, there are records of: a one-day suspension for returning late for lunch, a disciplinary warning for leaving the plant without permission, a three-day suspension for failing to follow a supervisor’s instructions (the employee told the supervisor “no fucking way, it’s not my job”), a three-day suspension for leaving the plant without permission, a warning for loitering, a six-day suspension for leaving the plant without permission, a six-day suspension for failing to perform assigned duties, a warning for failing to do work properly, a warning when an employee accepted an overtime opportunity and failed to report without a “good reason”, warnings for failure to perform adequately or for being absent without leave, and a six-day suspension which supervisor Conn described as encompassing an “unsafe act, conduct disruptive to the operation, failing to perform duties, insubordination, and threatening a supervisor”. In all of these cases, the supervisor is involved in observing or investigating the incident, confronting the employee and assembling information to support the employer’s position.

60. We do not suggest that the supervisors are the “kings of the shop” that they may once have been, imposing their will cavalierly without much accountability. Modern forms of business organization and four decades of collective bargaining have changed that. But neither are the supervisors passive observers or mere conduits. They play an integral role in enforcing workplace rules; and it is a role which inevitably puts them in the employer’s camp, pitted against the employees who report to them.

61. A few examples will illustrate this aspect of the supervisor’s job.

62. This is a description of an incident which resulted in a six-day suspension “for improper conduct - directing abusive language towards a member of management”. The member of “management” in question, is a supervisor who took these notes:

“At start of shift, Mr. Whitehead [a bargaining unit employee] is to keep rotary bin filled with charged material and crusher-processed material. He was reinstructed to do this at the start of the shift again as recently as Tuesday. He seemed to have confusion as to his responsibilities. This was settled prior to today.

At approximately 10:00 a.m. today the rotary operators came to me and said there was no other material for the next heat - that Mr. Whitehead had only brought over about four buckets of

material. I went to Mr. Whitehead on this and he said "So what". Then he said "I don't care" ... "How come the guys on the rotary didn't get it themselves". (Note: they did get their own material, slowing down rotary metal production).

At about noontime, about 11:00 a.m. or so, Mr. Whitehead said to Mr. Marone "Why the fuck don't you make another employee do his fucking job". During this time I was at the union office trying to get some help with this problem. Other employees were in the union area when I was there but no reps. I returned to the floor about 12:35 p.m. Mr. Whitehead was outside with 3 to 4 other employees and I approached him and said "What are you crying about now". He then accused me of telling other employees that he had taken a two-hour lunch. Another employee said no he didn't say that. He then called me the following: you are a wimp. You are a goof. Why don't you fuck off. It's a good thing I don't meet you on the street".

I asked him if that was a threat. He said yes. I told him he went too far. Then I walked away from the area. At that time he picked up a barrel outside and threw it across the doorway into the melt shop. There was a loud crash. I saw the barrel bounce around rolling back from the south verber by the south door. At that time I told Mr. Whitehead to leave this plant. He insisted that we go to IR together. I said I am going to IR and he was leaving the plant. How did I know what he was about to hit me with".

It is a little difficult to portray the supervisor here as just an ordinary employee. He is an authority figure speaking and acting on behalf of management.

63. April 1987 was not a good month for employee Prokopetz, who eventually received a twelve-day suspension because of a series of incidents including those documented in these "Foreman's Record of Disciplinary Action" forms:

"Mr. Prokopetz had accepted a work opportunity to work forty hours over on to the No. 1 shift to support the intake manifold operation in the ECP Department. The No. 1 shift's Quality Control Department has no supervisor at present. I received a phone call at my residence at approximately 1:15 a.m. from the production supervisor, K. Palmer of the ECP area. No inspector had shown up for the No. 1 shift. Prokopetz' reply when questioned was that "I just left and didn't come back". Prokopetz agreed with me that you just can't leave the plant when you feel like it. Prokopetz is aware that disciplinary action is being taken.

Between 3:30 and 4:30 p.m. Prokopetz was not at his work station. Myself [W. Conn] and H. Krenshaw searched the obvious areas in the plant for Prokopetz' whereabouts. The cafeteria, office, locker room, washrooms, x-ray, etc. He could not be found. Security was notified. Prokopetz returned to his work station at approximately 5-5:10 p.m. After questioning, Prokopetz stated "I went to cash my cheque". [I asked] Who gave you permission to go? "No one". Again, Prokopetz is aware that disciplinary action is being taken".

Again, supervisor Conn is taking an active role to enforce company rules, and his authority is reinforced by the threat of discipline.

64. Even Mr. Kenney, who was the union's advisor throughout these proceedings, (and tended to minimize his "managerial" authority), had numerous incidents in which altercations with employees reporting to him, ultimately resulted in employee discipline. Again, a couple of examples (taken from the Foreman's Record of Disciplinary Action documents) will serve to illustrate this kind of incident.

65. The first incident with an employee named L. Basque occurred just after midnight when he refused to follow Mr. Kenney's instructions, replying "No fucking way, it's not my job". Mr. Kenney explained that he did not have sufficient manpower, and repeated his instruction which Mr. Basque continued to defy. Mr. Kenney then filled out a Foreman's Record of Disciplinary Action. Some time later, there was a second incident which Mr. Kenney describes as "insubordination" in the following recorded circumstances:

“At approximately 12:35 a.m. Mr. Basque walked into the front office (he had just been advised he was to be disciplined for a work refusal). I asked him what he was doing there. He demanded his [union] committeeman then, and asked to speak to Mr. Vincent. I said he should return to his job and he will get to see Mr. Vincent and his committeeman in due course. He called me an ass hole. I let it go at that and left. About ten minutes later I was going down to the I4A DK to follow up on Station 5 repairs when I noticed Mr. Basque standing on the north side of the main aisle with a newspaper in his hands and he was speaking to a fork truck driver. About five minutes later I was going to the electricians maintenance compound to get an electrician to fix an emergency plan button on the shuttle circuit for the I4 Saw when I passed Mr. Basque on the south side of the main aisle talking to Mr. E. Tracey. I asked Mr. Basque why he was not at his work station. Mr. Basque said “You are a perfect ass hole” [and other profane comments which need not be recorded here] ... I then advised Mr. Basque he would be written up for insubordination. He then told me [expletive deleted]. I then told him he will be written up in future for any further infractions. He then said “Go out to the ECP and get some more coding”. I asked him to repeat what he said and he did. “Why don’t you go out to ECP and get some more coding”. I left”.

Mr. Basque was eventually suspended for insubordination based upon the supervisor’s evidence which the labour relations personnel recorded as follows:

“B. Kenney, Supervisor, states that on two occasions Mr. Basque called him a perfect ass hole and [expletive deleted] ... The company feels the penalty is just having regard to the circumstances”.

66. We do not think that it is necessary to multiply the examples. However attenuated the supervisors’ authority may be, it is clear that they have both the ability and obligation to invoke discipline in order to compel adherence with workplace norms, and that discipline sets in train a process which can put bargaining unit employees in jeopardy. No doubt, the supervisors’ observations can be challenged and recommendations may not prevail, and he may be left out of the follow-up altogether, or be distinctly unhappy with the eventual result. As one supervisor explained: “I would have liked him to get more, but it’s obvious that’s the first step in the discipline so that’s all he could get ... I was very unhappy that day ...”. But as far as rank and file employees are concerned, those supervisors represent “managerial” authority which may be exercised to their detriment.

67. Despite the terms of the collective agreement, the company’s actual practice does not seem to involve a significant role for supervisors at the first step of the grievance procedure. It appears that this tends to be a labour relations function in the nature of a review, undertaken by someone removed from the actual precipitating event. Mr. Chandler indicated that the supervisor is not typically involved in the processing of disciplinary grievances because he would have been the initiator of the penalty in the first instance (but may have discussed it with labour relations prior to doing so), and the process involves an independent review. Supervisors would however be involved in the company’s investigation - especially if it was their conduct under review - and would be expected to give evidence if the matter progressed to litigation.

68. No matters have gone to arbitration in recent years, so no supervisor has actually been called upon to give evidence in support of the company’s position. It is interesting to note, however, that a supervisor was involved as the company’s representative at a meeting to resolve an unfair labour practice complaint against the union, and he was also involved in the eventual settlement of that complaint.

Conclusion

69. In our collective bargaining system, the identification of “managerial functions” is an exercise in characterization, weighing the factors which point one way or the other in order to

determine on which side of the divide the disputed individuals fall. In this case, when one considers the number of supervisors in relation to “subordinates”, the exclusivity of the supervisory functions, the trappings of management which distinguish supervisors from other employees, and the variety of circumstances which place the supervisors’ duties and obligations at odds with the employees they supervise, we must conclude that they fall on the managerial side of the ledger. There is clear evidence that they exercise functions which bring them within the “mischief” that section 1(3)(b) was designed to avoid, and conversely no reason why the Board should interfere with a status quo accepted by the persons involved for many years.

70. It is our opinion that the supervisors exercise “managerial functions” within the meaning of section 1(3)(b) of the Act and, therefore, are not “employees” within the meaning of the Act. In this regard, our conclusion is the same as that reached by the Board, in similar circumstances, in *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396, where, as here, the Board concluded that a group of automotive supervisors exercised “managerial functions”.

71. It follows that this application must be dismissed.

1575-91-R; 1902-91-U Labourers International Union of North America, Local 607, Applicant/Complainant v. **Grant Development Corporation** and/or The Ojibways of Pic River, First Nation (The Pic 50 - Heron Bay Indian Band), Respondents

Certification - Certification Where Act Contravened - Construction Industry - Discharge - Employer - Interference in Trade Unions - Intimidation and Coercion - Union alleging that when employer learned of certification application, it eliminated all employees known or believed to be union supporters - Parties disputing whether construction company or Indian Band the “employer” - Board finding construction company to be the “employer” and that termination of aggrieved employees tainted by anti-union animus - Union entitled to certification on the basis of membership support in excess of 55 percent and under section 8 of the Act - Certificate issuing

BEFORE: *R. O. MacDowell, Alternate Chair, and Board Members W. A. Correll and R. R. Montague.*

DECISION OF THE BOARD; January 28, 1993

Introduction

1. This is an application for certification which was heard together with a related unfair labour practice complaint.

2. In the certification application the union seeks confirmation as the bargaining agent for a group of employees working as construction labourers in North Western Ontario. The application was filed (by Registered Mail) on August 1, 1991, received by the Board on August 6, 1991, and processed on August 8. Notices of the application were sent to the affected parties, by mail, and received a few days later, in the ordinary course of the mails.

3. The unfair labour practice complaint was filed on September 5, 1991, and alleges a pat-

tern of illegal conduct, beginning August 13-15, and continuing thereafter. Briefly put, the union alleges that when the employer learned of the certification application, it immediately eliminated all employees known or believed to be union supporters, and replaced them with workers known to be reliably non-union.

4. Because the evidence respecting the application and complaint was intertwined, the two proceedings were consolidated and heard together. For the same reason, the case will be disposed of with a single decision. The parties will be referred to in abbreviated form as “the union”, “Grant”, and “the Band”. Conwest Exploration Company Limited will be referred to simply as “Conwest”. Statutory references will be to the Legislation as it was in August-September 1991, when these proceedings began.

5. For ease of exposition, we will begin with a brief description of dispute: what is agreed upon and what is not, and a short statement of the parties’ positions. We will then turn to the evidence and our determination of these various issues.

What the Case is about

6. There is no dispute and the Board finds that the applicant is a trade union within the meaning of the Act.

7. The Board further finds that this is an application for certification within the meaning of section 121 of the Act - that is, this is a “construction industry certification application”: the applicant is a union which according to established trade union practice pertains to the construction industry; and the employer is operating a business in the construction industry; and the employees affected are construction workers. The particular employees affected by this application were working as construction labourers on a dam site and power project on Black River, just east of Marathon, Ontario.

8. The parties are in agreement that *if the Board finds Grant to be the employer*, the unit of employees appropriate for collective bargaining should be framed as follows:

all construction labourers and all employees engaged in cement finishing, waterproofing or restoration work in the employ of Grant Development Corporation in all sectors of the construction industry *excluding* the industrial, commercial and institutional sector in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.

Having regard to this agreement of the parties, the Board finds this unit to be appropriate for collective bargaining.

9. We have emphasized the phrase “if Grant is the employer” in the preceding paragraph, because that is one of the issues which the Board must determine. Those issues can be summarized as follows:

- (a) Is Grant or the Band “the employer” of the workers affected by this application?
- (b) How many construction labourers were there in the bargaining unit on August 1, the application date (bearing in mind that there may have been other employee categories working on the site that day and, on a construction project, the number of employees actively at work may vary from day to day)?

- (c) Were a number of employees discharged because they were believed to be active or potential union supporters; and,
- (d) Is the trade union entitled to certification on the basis of its membership support (see section 7(2) of the Act), or because of the employer's serious unfair labour practices (see section 8 of the Act), or on both bases.

10. The union relies upon the unfair labour practice allegations not only to seek relief on behalf of the aggrieved employees (primarily compensation for lost wages), but also as an independent basis for certification. That is why the two proceedings are intertwined. Section 8 of the Act reads as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

11. The union contends that the Band is the employer, that a number of employees were illegally discharged, and that it is entitled to certification in accordance with *both* section 7(2) and section 8 of the Act. The union submits that it enjoys the membership support of a majority of the employees proven to be in the bargaining unit at the time the application was made, and in addition it is entitled to certification under section 8. The union points out that under section 91(5) "the employer" is obliged to establish that any employee discharge is free from improper considerations, and since either the Band or Grant must be the employer, one of them must come forward with an explanation for the termination of its supporters. The union contends that, for their own reasons, both respondents are "anti-union" and both acted in their own way to remove the union presence from the project. In this respect, the respondents' organizational and commercial interests coincide, even though, in these proceedings, they are taking adverse positions. However, in the union's submission the Band is the employer, and because of the unfair labour practices in which both respondents were involved, a section 8 certificate is warranted.

12. The Band replies that Grant is the employer of the labourers affected by the union's certification application, and if there is any unfair labour practice, Grant is solely responsible for it. The Band denies any knowledge of how the persons working on the power project came to be out of a job, and maintains that its only function was to refer them to work as part of an affirmative action program designed to channel work opportunities to Band members. It was not the "employer", but rather a referral and payroll service which Grant was compelled to engage by the terms of its commercial arrangement with Conwest.

13. Grant replies that the Band is the real employer because it is the one selecting the workers involved, paying them, and generating the related employment documentation. The Band is a "labour only subcontractor" and Grant is a purchaser of these labour services. In Grant's submission, there were bona fide business reasons for the workers' departure from the construction site, and for the failure to recall them. Grant asserts that the workers were laid off because of an unanticipated bottle-neck in the construction schedule, and they did not return because of a festering dispute between Grant and the Band (their employer) concerning the terms upon which its services would be engaged. Were it not for this commercial dispute, the workers would have been recalled in a few days. The union had nothing to do with it. It is mere coincidence that its supporters were

removed from the site at the same time that the respondents learned of the certification application.

14. Finally, the union and Grant differ on the number of employees at work in the bargaining unit on the application date. The Band has no direct knowledge of that issue, maintaining, in any case, that they were working for Grant.

* * *

15. The evidence respecting these various matters was received over a number of days at hearings held for that purpose in Thunder Bay, and not surprisingly, the parties had quite different versions of "the facts", and urged us to draw quite different inferences from the evidence. We do not think it is necessary at this stage to embark upon any extensive analysis of the witnesses' relative credibility, or to try to reproduce in these reasons a transcript of the testimony, highlighting those portions which we find to be credible but incomplete, credible but mistaken, or simply untrue. It suffices to say that in assessing the witnesses' credibility, we have taken into account such factors as: their demeanour when giving their evidence; the clarity, consistency and general plausibility of that evidence when tested by cross-examination; the witness's ability to resist the tug of self-interest or self-justification when framing their answers; the willingness to concede facts, statements or attitudes (antagonism to unions, for example) which might be seen to be contrary to their interest in these proceedings; whether the oral evidence or current recollections are consistent with reliable documentary material prepared before this litigation began; and what seems most probable in all the circumstances.

16. It will be convenient to sketch in some general background, then turn, more specifically, to the various issues outlined above. The provisions of the Act relating to the union's unfair labour practice allegations are as follows:

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

* * *

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express his views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

* * *

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the

imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

* * *

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

* * *

91.-(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

The provisions of the Act which touch on the list dispute include:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at the time as is determined under clause 105(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of the employees are members of the trade union, the Board may direct that a representation vote be taken.

* * *

121.-(1) Where a trade union applies for certification as bargaining agent of the employees of an employer, the Board shall determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it shall not confine the unit to a particular project.

(2) In determining whether a trade union to which subsection (1) applies has met the requirements of subsection 7(2), the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made.

* * *

123. An agreement in writing between an employer or employers' organization, on the one hand, and a trade union that has been certified as bargaining agent for a unit of employees of the employer, or a trade union or a council of trade unions that is entitled to require the employer or the employers' organization to bargain with it for the renewal, with or without modifications, of the agreement then in operation or for the making of a new agreement, on the other hand, shall be deemed to be a collective agreement despite the fact that there were no employees in the bargaining unit or units affected at the time the agreement was entered into.

Background

17. In 1987-88, the Ministry of Natural Resources indicated an interest in exploiting the hydro-electric potential of the Black River through the construction of a dam and power plant near Heron Bay. Various proposals were solicited and assessed. The successful one came from the "Begetekong Power Corporation". Begetekong was a federally incorporated joint venture, owned equally by David Carter, an independent entrepreneur, and the Band, which has a reserve at Heron Bay.

18. The proposed Hydro project was not situated on the Band's reserve lands. Nevertheless, the Band had considerable leverage over the way in which the project unfolded. The site lies within the scope of an outstanding aboriginal land claim, and the project could be said to affect traditional aboriginal rights in adjacent lands and waters. As a practical matter, the development could not go ahead without the Band's approval. No one would risk investing millions in a project, the ownership of which might later be subject to litigation.

19. But neither the Band nor Carter had the capital to develop the site on their own. Accordingly, they turned to Conwest, to whom they sold their interest in Begetekong - and hence the right to develop the site - for a sum of money, plus a share of the net profit from the sale of electricity once the plant was in operation.

20. The "net profits interest agreement" with the Band was executed on October 16, 1990. Most of its details are not particularly relevant. Conwest acquired ownership of the site together with the right to develop and operate the generating station, and the Band acquired a share of the net operating profits. One critical feature of the deal was the Band's release of all other claims in respect of the project or its operation, and the Band's undertaking not to do anything to interfere with the planning, development, construction, or operation of the facility. However, another critical feature from the Band's point of view, was Conwest's undertaking to promote employment opportunities for Band members. Article 6.2 of the agreement reads:

6.2 In both the construction and operational phases of the Black River project, Conwest shall use its best efforts to give priority to employing members of the Band who are equally qualified with other persons being offered employment and shall also require its contractors and subcontractors to use their best efforts to give such priority. The employment opportunities that shall be made available to members of the Band on this basis include, without limiting, road construction and maintenance, including snow removal, bush clearing and grass cutting and general ground maintenance.

21. Once the agreement with the Band was settled, Conwest was in a position to begin construction of the dam, the powerhouse and the related transmission facilities. To do that, Conwest engaged a number of engineering and construction firms. One of them was Grant. Grant is a general contractor with head office in Englehart, Ontario, and considerable construction experience in North Western Ontario.

22. Grant is a "non-union" company. Its employees have never opted for trade union representation; and there is not much doubt that Grant would prefer to remain "non-union".

23. Grant has a regular core of workers whom it tries to employ on a regular basis. Grant prefers to meet its employment requirements from this pool of known and valued workers. Grant prefers not to hire "outsiders" if it can be avoided.

24. The Band had no part in selecting Grant or any other construction contractor working on the site. The Band did not act as owner or developer. The Band no longer had an ownership interest in the site. All it retained was an interest in future profits. However, during the construction phase, Band members were the beneficiaries of Article 6.2. In accordance with this undertaking, Conwest made aboriginal employment a condition of its commercial arrangements with the various subcontractors whom it retained - including Grant. The supplementary bid specifications include this advice to prospective subcontractors:

"... (5) the Contractor's attention is also directed to the Pic 50 First Nation. Conwest is committed to give employment preference to the qualified Band Members, and it will be a requirement that the Contractor give equal preference. The Band office will provide liaison to the Contractor

in this matter, and the Contractor shall, upon request from Conwest, provide a summary of Band employees, complete with job description, tenure, etc. ...”.

Any contractor wishing to take part in the project had to agree to hire native workers.

25. These contractual arrangements contemplate that qualified Band members will be employed on the project either by Conwest or its subcontractors. They do not contemplate that the Band itself will be a bidder or subcontractor, responsible for some portion of the construction work. They do not contemplate that the Band itself will be an employer of construction workers - although the Band office is to “provide liaison” and facilitate the hiring of Band members.

Who is the “employer” of the Band Members “working for Grant”?

26. In determining who is the “employer” of persons who are undeniably the employees of someone (i.e., as opposed to self-employed independent contractors), the Board typically considers a variety of factors, some of which are interrelated or overlap. These include: who exercises direction and control of the employees when doing their work, who allocates their duties, corrects performance, sets standards, determines hours of work, and so on; who sets wage rates and bears the burden of remuneration; who appears to be hiring the employees, imposing discipline (if any) and terminating employment for cause or otherwise; for whose benefit do the employees expend their labour and from what source do their work opportunities appear to arise; to put the matter another way, for whose organization do they appear to be working, and of which organization do they appear to be a part while performing their duties; whom do the employees themselves perceive to be their employer; was there an expressed intention to create an employment relationship, and if so, with whom; does one organization or another hold itself out to be the employer; and, apart altogether from common-law considerations, what choice appears to be more consistent with the statutory and labour relations framework within which the Board operates, and the decision must be made. None of these factors is necessarily determinative. Each case must be considered on its facts. However, the Board must be careful not to let commercial form obscure labour relations realities. (See generally cases such as *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645; *Ralston Purina Canada Inc.*, [1979] OLRB Rep. June 552; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538; *Sylvania Lighting Services*, [1985] OLRB Rep. July 1173; *Thunderhawk Developments*, [1983] OLRB Rep. Aug. 1378; *Alwell Forming Limited*, [1978] OLRB Rep. Aug. 709; and, more recently, *Nichirin Inc.*, [1991] OLRB Rep. Jan. 78.)

27. What then are the facts in the instant case?

28. Grant had no desire to hire aboriginal workers. It sought, unsuccessfully, to avoid Article 6.2 of Conwest’s agreement with the Band (as imposed upon Grant by the Bid Specifications) and were it not for those obligations, Grant would have had no dealings with the Band at all. But there was nothing racist about that. Grant simply preferred to meet its manpower requirements by drawing from the pool of tradesmen who had worked for Grant before - and whom the union contends were known to be reliably non-union. However, Grant had no option. Like other contractors on site, Grant was obliged to give some employment preference to qualified Band members.

29. Byron LeClair is the Band’s economic development officer. His office provided the “liaison” to the contractor mentioned in Item 5 of the Bid Specifications (above). LeClair explained that one of his duties was to help Band members find jobs.

30. Early in June 1991 LeClair approached Larry Jauvin, Grant’s project manager, to enquire what the company’s labour needs might be, and to ascertain whether Band members might have the required qualifications. LeClair learned that the company would probably need a couple

of equipment operators, and three or four labourers from each of the shifts it proposed to establish for its own employees. Jauvin indicated, in a general way, that the company would be prepared to pay twelve or thirteen dollars per hour for labourers, and that there might be some adjustment depending on employee skills or performance. No firm rates were fixed or promised.

31. With that information LeClair canvassed the out-of-work Band members to see if there were any who might meet the company's needs. Various criteria were applied including: whether the candidates had related experience, whether they were known to be good workers, and whether they were out of work for an especially long time or otherwise in particular need of a job. LeClair told persons whom he thought were suitable to go out to the job site and see Larry Jauvin who could put them to work. There was no job guarantee but, by the same token, no reason why Jauvin would be disposed to reject anyone referred to him by the Band. The work was unskilled, the proposed wage rates were not excessive, Grant was under an obligation to facilitate the employment of Band members, and it was understood that if Jauvin was unhappy with a worker's performance, he could be sent back, and the Band would find a replacement. In this regard, the Band's activities resemble those of a union hiring hall, selecting and referring out-of-work members to available work opportunities.

32. Not all of the Band members sent by LeClair were taken on by Grant, and at least one Band member (but perhaps as many as three) was engaged without reference to the Band office at all. Some Band members did prove unsatisfactory and were told to leave the site. The Band had no involvement in that determination, but it did send replacements, as needed.

33. We accept LeClair's evidence that the Band had no involvement with the Band members on site nor any advance knowledge of when they would be needed or sent home. The Band had no advance knowledge that Grant intended to lay off *all* of the Band members as Grant eventually did, and the Board was genuinely upset by this decision. However, we do not think that the Band was particularly concerned about an anti-union motivation. The Band's concern was that the Band members were all out of a job, and this was both contrary to the arrangement with Conwest, and generated political difficulties within the local community. Nevertheless, it is significant that the alleged "employer" had no knowledge that "its employees" would soon be out of work. Because, of course, it was *Grant's work* that they were doing.

34. For practical purposes, the wage rates were dictated by Grant. There were no real negotiations. The workers received what Grant was prepared to pay.

35. Grant determined the hours of work, the shift schedule, and days off. Grant decided when overtime would be worked and by whom, or when workers would be sent home because of a lull in construction activity. Grant determined what the Band members would be doing from hour to hour or day to day, where, and with whom. The Band members worked side by side with Grant employees doing similar work. The Band members worked in work crews arranged by Grant, with tools supplied by Grant.

36. The crews were supervised by foremen employed by Grant, who supplied whatever direction or admonishment was required. Some Band members thought that Jauvin and other Grant managers pushed them too hard. We make no finding about that. We do note that, apparently, some Band members did not meet Grant's standards of productivity or punctuality and those workers were "let go". This was a decision made by Grant. The Band was not involved.

37. The Band had no presence on site, nor was it involved in any way in the training, supervision, or allocation of workers, or the disposition of the work. The workers' time sheets were kept by Grant supervisors, who slotted them into the appropriate pay categories and recorded their

hours. The Band members' time sheets were grouped separately from those of Grant's regular employees, but otherwise the information and the way it was recorded were pretty much the same. And as we have already mentioned, the Band was not consulted or advised with respect to any changes in the organization or disposition of work, or the lay-off of employees, either because of a lack of work or unsatisfactory performance.

38. On the other hand, the workers' "official" employment documents all list the Band as their employer. The Band members were paid on Band pay cheques, drawn on the Band's bank account, with deductions for unemployment insurance and vacation pay. There were no deductions for income tax or Canada Pension Plan and the payment of Worker Compensation levies became a matter of some controversy. The Worker Compensation levy was paid by Grant, but remitted to the credit of the Band's Worker Compensation number. When the Band members' services were no longer required, the Band prepared the "separation certificates" necessary for unemployment insurance purposes. The "paperwork" therefore suggests that the Band is the workers' employer.

39. However, this documentation is a little misleading. While the Band made up the workers' pay cheques, it did so entirely on the basis of the information kept and supplied by Grant. The Band had no alternative. It had no involvement with the workers once the initial screening was completed. The Band depended upon Grant to keep track of the workers' names, hours of work, payment periods, premium pay (if any), and so on. This work cycle and information were entirely controlled by Grant.

40. Nor did the Band actually bear the burden of remuneration; for not only were the rates effectively set by Grant, but Grant provided the Band with the funds from which the workers were paid. There was a "chargeback" arrangement, whereby Grant supplied the payroll sheets, the Band issued a corresponding invoice to Grant which included an additional 10% (sometimes 15%) "administration fee", and Grant made the necessary payments to the Band's bank account so that the Band would be in a financial position to issue the necessary cheques. The Band kept a parallel set of records, but it was Grant that really paid the wages. The Band members' labour was not supplied to the Band nor did the Band actually pay for it.

41. It is a little difficult to determine what benefit Grant obtained, or what the Band actually did, for its 10% "administration fee". However, the pre-screening may have some value, cooperation with the Band was a condition imposed by Conwest (with whatever associated expenses being a "cost of doing business"), it may be unrealistic to apply strict economic criteria to a compulsory affirmative action program, and, in the result, Grant did obtain satisfactory workers at relatively modest wage rates. In any event, we do not think the "paperwork" provides an infallible test for determining the identity of the "real employer" - although it may explain why employees said they were "working for Grant" or "Larry Jauvin" but also said that the Band was their "employer".

42. LeClair explained that the main purpose for structuring the documentation in this way was to permit the employees to avoid income tax. As status Indians, purportedly working for the Band organization, the workers' earnings would be tax free. The avoidance of this tax burden was advantageous to all parties concerned. The Band set up its paperwork accordingly. It had no intention of being the workers' "employer" and was not the source of their work. The Band was a placement agency and an artificial payroll service designed with income tax in mind.

43. Before us, the Band and Grant each claimed that the other was "the employer", and that this was understood and agreed from the start. We do not accept either submission. It is evident that no one thought very much about this question prior to these proceedings, and certainly there was no shared understanding as to who would be "the employer" for the purposes of the

Labour Relations Act. That question only crystallized when Grant and the Band became respondents whose legal obligations might depend upon the characterization of their status. It was only at that point that each began to assert that the other was the “real employer” of the Band members affected by this application.

44. Having heard and considered the evidence, we are satisfied that we should not give much weight to the documentation, and much of the other evidence points to Grant as the “employer” for the purposes of the *Labour Relations Act*. Grant provides effective direction and control of the employees on the job, including Band members. Grant retains the effective power to hire, fire, promote, lay off or otherwise deal with those working for it. Grant bears the real burden of remuneration. Mr. Jauvin’s description of the Band as a “labour only subcontractor” is an exercise in semantics. In a functional, colloquial, and legal sense, the Band members are “working for Grant”. These workers are integrated with and properly regarded as part of the Grant organization. It is Grant which ultimately determines the work flow, the work pattern, and their essential terms and conditions of employment, and such significant questions (for *Labour Relations Act* purposes) as whether they are actively employed, as labourers, on the application date.

45. The entity making decisions or exercising authority of this kind is the “employer” for the purposes of the Act, and in our view, it is Grant. Indeed, once the initial finger-pointing subsided, it was evident that only Grant could answer the unfair labour practice allegations. Only Grant could provide an explanation of how it was that employees working one day came, unexpectedly, to be out of a job, then were never called back to work at the site again, despite the continuation of the work they were formerly doing. There was an explanation for this pattern of labour utilization, which we will discuss in more detail below. For present purposes, we only note that it is significant that Grant, and only Grant, was in possession of the information.

46. We find that Grant is the respondent *employer* in the certification application.

The Unfair Labour Practice Allegations

47. The provisions of the Act upon which the union relies for this branch of the case are set out above, and the law is not particularly complex. Where it is alleged that an employee has been discharged or otherwise dealt with contrary to the Act, it is incumbent upon the employer [here Grant] to come forward with an explanation for its actions which is entirely free of anti-union animus. If the employer’s conduct is motivated, in whole or in part, because an employee is a member of a trade union or has exercised rights protected by the Act, then the employer’s actions are illegal (see generally: *R. v. Bushnell Communications et al*, (1973) 1 O.R. (2d) 442 (O.H.C.), aff’d. at 4 O.R. (2d) 288 (O.C.A.); *Sheehan and Upper Lakes Shipping Limited, et al*, (1977) 81 D.L.R. (3d) 208 (Federal C.A.); *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, aff’d. by the Ontario Divisional Court under the name *Westinghouse Canada Inc. v. United Electrical Radio & Machine Workers of America, Local 504, et al*, 80 CLLC, ¶14,062).

48. In the instant case, therefore, it must be established that the reasons for the initial employee lay-off, and for the continuing failure to recall, were both totally untainted by anti-union considerations.

* * *

49. Larry Jauvin testified that the Band members (and a few others) had to be laid off between August 13-16, 1991 because, quite unexpectedly, there was no work for them to do at that time. They were not recalled to the site because of an unresolved dispute between Grant and the Band over the arrangements for native employment. Jauvin testified that the union’s organizing

campaign had nothing whatsoever to do with either decision. It was just coincidence that the union supporters were all laid off immediately after the company learned of the certification application. Indeed, Jauvin told the Board that he was indifferent about the certification application which he learned about on approximately August 13-14. He said that it did not bother him that an employee may be a union member because, over the years, he had "lots of guys" who had union cards and he once had one himself.

50. But in our view, the timing is telling, and the explanation advanced by the company simply does not withstand scrutiny.

51. The aggrieved employees testified that at the time of their lay-off it appeared to them that there was a considerable amount of work for them to do. They did not think much about their lay-off at the time because they did not anticipate being off work very long, and, in some cases, were told that they would be called back in a couple of days. By this time, the crew had stabilized, there was no question about the employees' abilities, and they reasonably expected to continue working until the end of the project. Grant concedes that the Band members were good workers whose performance was satisfactory.

52. The employees' impression of the amount of work available at the time of their lay-off is confirmed by Carl Larouche. Mr. Larouche was then a general foreman on the site, although he subsequently left the company's employ. As general foreman, Mr. Larouche was responsible for coordinating and supervising the work of a number of tradesmen, including Band members. Mr. Larouche was called as a witness for the Band, which, on this branch of the case, supports the claim of the aggrieved workers that they were discharged improperly.

53. Mr. Larouche testified that at the time of the lay-off there was lots of labourers' work to do. He was unaware of any need for a slowdown. Mr. Larouche's testimony directly contradicts that of Mr. Jauvin.

54. The fact that there was labourers' work available at the time of the lay-off is confirmed by what actually happened on site. Within a couple of days of the lay-off - purportedly for lack of work - new employees appeared on the scene, doing the same kind of work that had previously been done by the workers laid off. Their presence was verified by the independent observations of various witnesses, as well as the company's own employment records, which, on this point, we accept to be accurate.

55. The workers who were discharged (and who in a number of cases did support the union) were replaced by transferees from other Grant projects (whom the union claims Grant knew to be reliably "non-union"). Grant had only engaged a small number of workers who were not drawn from its regular pool of employees or former employees, and this entire group of newcomers was eliminated. In so doing, Grant removed the group that had indicated some appetite for trade union representation. And despite Grant's assertion that there was no work for them to do, it is clear that there was.

56. It is interesting to note that the construction schedule prepared by Grant in mid-May, shows a considerable amount of labouring work left to be done, both at the time of the lay-off, and afterwards. In fact, a company construction schedule prepared for submission to Conwest on August 12, only a day or two before the lay-off, also shows considerable labourers' work to be done at that time and thereafter. This documentation is totally inconsistent with the explanation now tendered by the company and was not successfully discounted by Mr. Burke, a company official who said that the lay-off was occasioned by a production bottle-neck and Grant's desire to send Conwest "a signal" that more work should be given over to Grant. Indeed, Mr. Burke's

cross-examination elicited answers which, if anything, suggest that the so-called scheduling problems, changes in design or unexpected developments all *increased* the amount of work available for labourers. Yet satisfactory employees were laid off and not recalled - replaced by workers from out of town for whom Grant would have to provide room and board.

57. In the circumstances, it is very difficult to accept that the workers were laid off because of an unexpected shortage of work. The anti-union inference suggested by the timing - a mass lay-off coincidental with notice of a certification application - was simply not rebutted by plausible evidence of business justification.

58. There is, moreover, considerable evidence that this was not the real or only reason for the lay-off. There is direct evidence of anti-union animus.

59. As early as mid-July, in a meeting with Byron LeClair and Band Chief Roy Michano, Jauvin identified Manual Twance as a union card carrier. Jauvin told the Band officials that Grant was a non-union operation and that Twance would have to go. There were other problems with this employee's performance as well; however, his union affiliation was clearly a concern. Shortly afterwards, Twance's employment was terminated.

60. Initially Jauvin denied that there was any mention of the trade union in this conversation with Byron LeClair and Roy Michano. In cross-examination, though, he admitted that the conversation had touched upon the employee's trade union membership and that there had been some discussion of the union at that time. Jauvin also initially testified that he had no knowledge of the union's organizing campaign until about August 14 when Byron LeClair showed him a copy of the Certification notice that the Band had received from the Board. However, Jauvin later admitted that he had known for some time that a number of Band members were signing union membership cards. Jauvin testified that he wasn't concerned about this union activity and did not bother to advise any other members of management about what was happening on site. Nevertheless, it was evident that, in Jauvin's mind at least, it was the Band members who formed the base of the union support. And, of course, it was the Band members who were laid off, en masse, at the same time as the company found out about the certification application.

61. Carl Larouche testified that on or about August 16, he was directed by Larry Jauvin to give notice of termination to Bob Martin and Bob Levesque. Levesque and Martin were two other "newcomers", who had been hired by Grant based on Larouche's recommendation. As we have already noted, Grant only (and somewhat unwillingly) took on a small group of workers with whom it was not previously familiar. Martin and Levesque were in this group.

62. Jauvin told Larouche that the Band members, Levesque and Martin, all had to be let go because they had joined the union. Jauvin said that it was unfortunate that the entire group had to be released because he had particular need for equipment operators and he would have to bring in replacements for the workers laid off; however, Jauvin indicated that it was not his decision. He had received instructions from the company's head office to terminate everyone involved with the union.

63. We find Mr. Larouche's testimony to be both candid and credible.

64. A few days after the lay-off, Barry Michano approached Jauvin and asked when he would be called back to work. Jauvin replied that Michano would not be re-hired until this "matter" (or "business") was cleared up, then asked Michano if he too had signed a union card. When Michano replied in the affirmative, Jauvin displayed a look of disgust, and repeated that no one would be called back to work until the matter was cleared up.

65. Wilford Nabigon also had a conversation with Jauvin shortly after Nabigon's lay-off. According to Nabigon, he asked Jauvin about the chances of getting back to work because he (Nabigon) had not signed a union membership card. Nabigon had been told by other Grant employees that this was the reason for the lay-off and Nabigon hoped that, because he had not signed a union card, he might be exempted.

66. Jauvin initially said that he could not talk about a return to work because the issue could be subject to litigation, and the company might be subject to a fine of \$1,000 per day (an apparent reference to an unfair labour practice prosecution); however, Jauvin later admitted that he "got the word" from head office to lay the Band members off because of the union's organizing drive. Accordingly, the evidence is that Jauvin's remarks to Nabigon (called by the union) were the same as those he made to Larouche, the company's (then) general foreman (called by the Band). And while these comments may indicate that Jauvin was not personally responsible for the lay-off, they also show that the union's organizing campaign was one of the reasons for it.

67. On August 16, in his capacity as project manager, Mr. Jauvin wrote to the Band as follows:

"Because of the present schedule, your services are not required for the immediate future".

On its face, this document appears to terminate Grant's relationship with the Band, and as it turned out, that termination was as permanent as the lay-offs proved to be. According to Mr. Burke, as of August the company was still trying to iron out its arrangements with the Band and expected to be bringing the workers back. But it didn't, of course, nor does "the present schedule" explain why Band members were laid off.

68. On the basis of the totality of the evidence, we are not persuaded that the lay-off of the Band members (and a few others) was motivated solely by bona fide business considerations. On the contrary, we find that the lay-off was prompted in whole or substantial part by Grant's desire to remove from its employ all those workers known to be members of or sympathetic to the union. And our finding in this regard makes it exceptionally difficult to conclude otherwise with respect to Grant's continuing refusal to return any of these employees to work.

69. Grant asserts that it found itself enmeshed in a dispute with the Band and on the horns of a dilemma; and we accept that this is so. But it was not quite the dilemma Grant described. Grant was obliged by its commercial arrangements with Conwest to provide employment opportunities for native workers, but having done so, it found itself saddled with a group of employees who (unlike its regular workers) wanted trade union representation. And while the Band was not itself enamoured of the trade union, neither could it be seen to publicly abandon its members, or the work opportunities to which it believed itself entitled by its arrangements with Grant and, ultimately, Conwest.

70. We also accept that there was a vagueness and variability in Grant's relationship with the Band which, for Grant, was a continuing irritant - especially since Grant had been unwilling to deal with the Band in the first place. There was, for example, a dispute about Workers' Compensation levies which Grant eventually made on behalf of the workers to the credit of the Band's W.C. number, together with a number of requests from Grant to the Band to provide the appropriate W.C. "letter of good standing". However, the fact remains (and Desmond Burke confirmed) that Grant's relationship with the Band officials was a good one, and after some initial adjustments, the Band members were performing satisfactorily and economically from Grant's point of view. The Worker Compensation documentation remained incomplete but this was not a serious issue. An injured worker's claim was processed without incident, monies were remitted to the Band's num-

ber without difficulty, and there was no actual liability for which Grant was responsible. Nor do we accord much significance to the way in which the Band's administration fee was calculated. Grant eventually paid in accordance with its own understanding of the arrangements, the accounts were balanced in a general reconciliation, and the Band never quarrelled with this outcome.

71. In summary, then, while there may have been some irritants in Grant's relationship with the Band, we are not persuaded that those problems were sufficiently serious to explain the total repudiation of that relationship or Grant's decision not to re-hire any Band members. On the contrary, we find that Grant refused to take the Band members back for the same reason that it had laid them off: because some number of them had joined the union and Grant was determined to remain a "non-union" company. And once Conwest was prepared to relieve Grant of its obligation to hire native workers, as Conwest eventually did, Grant was free to follow its anti-union inclinations and replace the union supporters with new employees.

72. For the foregoing reasons, the Board finds that the termination of the aggrieved employees was contrary to sections 65, 67, and 71 of the *Labour Relations Act*, and that their ongoing lay-off was a continuing breach of the Act.

73. The Board therefore directs that the grievors be reinstated, forthwith, to the company's employment rolls and compensated, with interest (in accordance with Practice Note 19) for all wages and benefits lost.

74. The Board will remain seized in the event there is any continuing dispute about the amount of compensation to which the employees may be entitled. We note, however, that the evidence before us establishes that, were it not for their unlawful terminations, these employees would have continued to work until the end of the project; moreover, any question of "mitigation" must be measured in light of both the Board's comments in cases such as *Jackmorr Manufacturing Limited*, [1987] OLRB Rep. Aug. 1086, and the employment realities of North Western Ontario. The fact is, that there really was little or no work available for the aggrieved employees in the local area. That is why the affirmative action program was such an important part of the arrangement from the Band's point of view.

Certification pursuant to Section 8 of the Act

75. As the Board has indicated in a number of cases, certification can be granted under section 8 of the Act if three conditions are satisfied:

- (1) The respondent must have contravened the Act;
- (2) the contravention(s) must have resulted in a situation in which the true wishes of the employees are not likely to be ascertained by a representation vote; and,
- (3) the applicant must have membership support that, in the opinion of the Board, is adequate for the purposes of collective bargaining.

In our opinion, the evidence in this case meets all three criteria.

76. We have already indicated our finding that the respondents' mass layoff of all those thought to be union supporters contravened sections 65, 67 and 71 of the Act. Viewed objectively, this unlawful conduct has created a situation in which it is highly unlikely that any kind of representation vote would disclose the employee's true wishes about the union or collective bargaining.

Indeed, it is difficult to conceive of a more serious or graphic unfair labour practice than the kind which has occurred here. Grant has summarily discharged everyone whom it believed had exercised or might potentially exercise the right to join a union. Grant has made it abundantly clear to union supporters or potential union supporters that if they choose the union they are effectively choosing unemployment. The aggrieved employees were ultimately successful in securing redress, but that result did not occur without protracted litigation during which they had to rebut Grant's assertion that the reason for their termination was the ebb and flow of construction activity, or the actions of the Band. In the meantime, the construction work which the grievors expected to do was undertaken by others. In these circumstances, it is difficult to see how any kind of a fair test of employee wishes could be undertaken. Grant's actions have totally poisoned the atmosphere and undermined the normal statutory mechanisms for measuring employee support for collective bargaining.

77. Does the union have support adequate for collective bargaining? In our opinion, the answer is yes. The union has established a substantial core of membership support regardless of the disposition of the list dispute; and we do not think we need attach much significance to the fact that this core may not be a majority or may vary as a proportion of the overall workforce. In the construction industry, a fluid workforce is not unusual, and the Board is not required to take into account changes in the level of employment after the application was made. Indeed, a collective agreement can even be negotiated where there are no employees actively at work in the bargaining unit at the time the collective agreement was entered into (see section 123 of the Act). Whether membership strength is adequate under section 8 is not a question of numbers or percentages or whether the union would ultimately be successful in negotiating a collective agreement (although in this regard now see the "first contract" provisions of the Act). It is rather an assessment of the totality of the circumstances (see for example: *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848 and cases referred to therein; and, *Aurora Resthaven Extended Care and Convalescent Centre*, [1986] OLRB Rep. Aug. 1031). In the circumstances of this case, it is the Board's opinion that the union has support adequate for collective bargaining.

78. We find, therefore, that quite apart from section 7(2) of the Act, the union is entitled to certification pursuant to section 8 of the Act. In other words, quite apart from the dispute concerning the list and composition of the bargaining unit, our findings respecting the number of employees on the list and the relative proportion of employees who are union members, section 8 of the Act provides a separate and independent basis for the union's certification, which is applicable to the facts of this case.

79. However, would the union also be entitled to certification under section 7(2) of the Act? To answer that question, it is necessary to review the way in which the Board determines the population of construction industry bargaining units, and the evidence which the parties provided in this case.

The Composition of the Bargaining Unit and Certification pursuant to Section 7(2)

80. The Act requires the Board to ascertain the number of employees in the bargaining unit at the time the application was made, but there are no legislated criteria to guide the Board in this task. Obviously, there is really no difficulty in respect of those individuals who are both employed and actually *working* on the application date at a job described in the bargaining unit. The problem arises in respect of individuals who may not be actively at work or, as here, there is some dispute about who was at work, and who among those admittedly working was actually employed in the trade to which the bargaining unit relates.

81. The construction industry poses a number of special problems, because employment is

necessarily transitory. Employees are quite literally “here today and gone tomorrow”. A construction project is completed in phases, so that on any given day the mix of tradesmen on a site can be different, and that mix will vary with such factors as: the exigencies of the market, the pace of work, the relationship with other contractors and the vagaries of the weather. Similarly, what a tradesman may do can vary markedly from day to day so that it is sometimes quite difficult to pin down the precise number of employees actively at work on the application date, and the trade within which they are working. And, while it is easy to talk about the trades in generic terms - carpenter, electrician, sheet metal worker, labourer, etc. - it is not always easy to categorize particular functions, because a carpenter or bricklayer, say, will sometimes do work that is similar to the work a labourer might also perform.

82. To cope with the special problems in the construction industry, the Board has developed a particular rule of thumb for ascertaining the number of employees in the unit and their “trade” “at the time the application was made” (to use the words of section 7(2)). The Board determines the employee complement to be that which exists on the application date - fully realizing that the number may well be different the day before, or the day after. This “rule of thumb” has been accepted and applied in the construction industry for forty years - and for a very practical reason: anything else could lead to costly and time-consuming litigation on every certification application, causing delay which would severely prejudice the establishment of bargaining rights purportedly guaranteed by the statute. If time is of the essence generally in labour relations, that maxim is particularly true in the construction industry; and, unfortunately, this proceeding is a case in point. In the time that it has taken the parties to litigate the matters in dispute between them, the construction project to which the application relates has been completed. If Grant does not return to the District of Thunder Bay the whole exercise will be academic: it will have done its work “non-union” on the Black River project, and there may be no other project to which collective bargaining can practically relate. And even if one focuses on the application date, with the passage of time, it becomes quite difficult to determine precisely who was actively at work on the application date, and whether those employees were engaged in work within the bargaining unit, because memories fade and documentary material may be imprecise or incomplete.

* * *

83. In the instant application, the trade union has filed documentary evidence of membership on behalf of more than fifty-five per cent of *what it claims to be* the employees in the above-described bargaining unit. This documentary evidence took the form of membership cards, which include a combination application for membership and an attached receipt. These cards are signed by the subject employee, and the receipts are countersigned by a witness (“the collector”) and indicate a payment of at least one dollar to the union in respect of its membership fees.

84. This documentary evidence is supported by a properly-completed Form 80 Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited. The membership evidence meets the form and timeliness requirements established pursuant to sections 1 and 105(2)(j) of the Act, and clearly demonstrates that these individuals are “members” of the union for the purposes of the Act.

85. There is no real dispute, therefore, that all of the persons who signed union membership cards are, by statute, “members” for the purpose of this certification application. For these card signers, the question is not whether they are “members” of the union, but whether they were employees in the bargaining unit (i.e., actively working as “labourers”) on the application date, August 1, 1991. In order to perform the arithmetic calculation contemplated by section 7(2), the

Board has to determine the total number of employees in the bargaining unit, as well as how many of them have signed cards. And it is the former number which is in dispute.

86. In response to the certification application, the employer filed a list of individuals *claimed by it* to be employees in the bargaining unit on August 1, 1991. The union challenged a number of the names appearing on that list, claiming, alternatively, that the individual was not actively at work on August 1, 1991 [the Board's test], or that he was not employed *as a labourer*, or, in some cases, that the disputed individual was not an employee eligible for inclusion because of section 1(3)(b) of the Act. The union's claim was that the employer had loaded the list with regular employees known to be non-union, and intentionally omitted those individuals who it knew or suspected were union supporters; and this submission has at least surface plausibility because the persons omitted from the list are individuals whom we have found were illegally discharged. The union submitted that a number of persons should be added to the employer's list.

87. For its part, Grant maintained that the individuals whom the union sought to include on the list were not its employees, or were not at work on the application date or, if they were at work, were employed in a capacity other than that of construction labourer. As is typical in disputes of this kind (and perfectly plain to all of the parties), all of the individuals whom the union sought to add to the list were supporters and all of those whom it sought to remove were not. The proposed lists were totally different. Only one employee - Bob Martin - was common and not disputed.

88. There were, in Grant's submission, 14 individuals properly on that list, and the proposed Schedule "A" has a confirmatory signature as required by the Rules. However, in this case the list is signed by Mr. Braithwaite, counsel for the respondents, and indicates that it has been prepared on the basis of the instructions he received. Consequently, Mr. Braithwaite is clearly not responsible for, nor able to verify, the accuracy of the list. He could only record what he was advised by Grant's representatives.

89. Given the nature of the issues raised in these proceedings, and the desirability of full disclosure prior to the hearing, the Board directed all parties to produce all of the relevant documentation. In compliance with that direction, Grant produced, among other things, all of the payroll records said to be relevant, and the daily labour reports listing its employees at work, day by day, over the course of the project. The daily labour report for the application date, August 1, 1991 (and for the preceding and following day) lists 7 employees actively at work - not the 14 appearing on Schedule "A". There is an overlap, but the two lists are obviously not the same. There are no Band members on Schedule "A" at all. And Bob Martin - the person who was not in dispute - does not appear from the records to be actively at work on August 1, 1991, the application date.

90. We recognize, of course, that the way in which the respondent Grant compiled its employee list is intertwined with its position that it was not the "employer" of Band members. But that still does not explain the discrepancy, nor in all the circumstances of this case are we inclined to give much weight to employment documents of this kind - at least in the absence of confirmatory evidence that the persons said by the employer to be actively at work in the bargaining unit actually were employed (despite their absence from the employer's own daily labour report for August 1) and actually were working as labourers. There was no such evidence. Mr. Jauvin did not keep the time sheets which form the basis of the daily labour report and Mr. Burke was not on site at all. None of the employer's witnesses addressed the discrepancy between the daily labour report and its proposed Schedule "A" list, nor was there much evidence about what the employees were doing on the day in question.

91. In short, while the Schedule “A” sets out the employer’s *position*, it is not obviously consistent with the employer’s own documentary material, and is unsupported by any other or first-hand evidence to establish the accuracy of any of those documents.

92. By contrast, the union did call direct evidence from Barry Michano and Sinclair Michano, both of whom testified that they were working as labourers on August 1, 1991, and, so far as they were aware, they were the only labourers working on the site that day. They testified that they had a firm recollection of their duties because they had been visited by the union representative (no doubt contemplating an imminent certification application) and told to take careful note of their job functions for August 1, 1991. And that is what they did. They had only an imperfect recollection of what may have been done by others that day. In the result, theirs is the only concrete, first-hand, and unambiguous evidence of employment as a labourer on the application date. Indeed, there is no similar evidence respecting the other union supporters whom the union asserts should be on the list, or respecting the other persons whom the company submits were working as labourers that day.

93. Thus, if the Board were required to decide (as we believe it must) on the basis of the *reliable evidence* (as opposed to the parties’ assertions) of the number of “employees in the bargaining unit at the time the application was made”, that number would be: 2 - Sinclair and Barry Michano. The other persons named by the union or the employer may or may not have been actively at work that day and, if at work, they may or may not have been employed as a labourer. We are simply unable to make that finding on the basis of the reliable evidence that the parties have brought before us. All that can reliably be said is that the bargaining unit described above contained at least 2 individuals, and both of them were trade union members within the meaning of section 1(1) and 105(2)(j) of the Act.

94. We are not entirely sanguine about this result; however, it is the one which appears to us to be warranted by the evidence. And it supports a finding of entitlement to certification, under section 7(2) of the Act. *apart from, and in addition to*, the union’s entitlement under section 8 of the Act.

95. Accordingly, on the basis of the totality of the evidence before it, the Board finds that not less than fifty-five per cent of the employees of the respondents in the bargaining unit described in paragraph 8 hereof, at the time the application was made, were members of the applicant on August 16, 1991, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

Conclusion

96. For all of these reasons, the Board finds that the union is entitled to certification under both section 7(2) and section 8 of the Act, and a certificate will therefore issue in respect of the bargaining unit described in paragraph 8 above.

97. As noted, the Board will remain seized in the event that there is any outstanding problem concerning the unfair labour practice remedy.

3472-91-U James N. Krall, Complainant v. United Brotherhood of Carpenters and Joiners of America Local 785, Respondent

Construction Industry - Duty of Fair Referral - Remedies - Unfair Labour Practice - Board previously upholding complaint and reconvening on issue of damages - Board concluding that duty of fair referral complainant owing duty to union to mitigate losses, but not obliged to accept referrals as apprentice to fulfill duty - Board also deciding that damages should be reduced because of complainant's unreasonable delay in filing complaint

BEFORE: *Janice Johnston, Vice-Chair.*

APPEARANCES: *James Krall, Sandra Krall and Don Krall for the applicant; Norman L. Jesin and Karl Ball for the respondent.*

DECISION OF THE BOARD; January 25, 1993

1. The Board by decision dated August 19, 1992 found the respondent (the "union" or "Local 785") to be in violation of section 70 [formerly section 69] of the *Labour Relations Act* (the "Act"). The Board found that the actions of the union requiring the complainant, Mr. Krall, to sign an apprenticeship contract thereby negating his journeyman status were contrary to the Act. As a result of the union's conduct, Mr. Krall's membership with the union was suspended and the union no longer referred him to work assignments.

2. The appropriate remedy was not addressed by the parties therefore the Board referred this matter to the parties and remained seized. The applicant notified the Board that the parties had been unable to reach agreement and a hearing was scheduled to deal with this issue.

3. The facts of this case are set out in the Board's earlier decision and it is not necessary to repeat them all. The facts relevant to an assessment of damages are as follows. Mr. Krall was laid off from a work assignment in February, 1991 and he immediately went down to the union hall and signed his name to the out-of-work list. Mr. Krall applied for and received unemployment insurance after this lay-off. On June 3, 1991 the union offered him a job referral as a sixth term apprentice. Mr. Krall refused this referral as he feared it would jeopardize the position that he had taken, namely that he was no longer an apprentice but was a journeyman. Mr. Krall attended at a lawyer's office the next day. Over a period of time the lawyer, Mr. Coleman, wrote several letters on his behalf, one of which was to the Ministry of Labour. By letter dated July 30, 1991 the Ministry of Labour responded in part, as follows:

The *Labour Relations Act* provides a legislative framework for collective agreements in the construction industry and also has a number of sections (S68 and S69) dealing with the rights of Union members working under a collective agreement or being referred to work under a collective agreement. The *Labour Relations Act* is enforced by application to the Ontario Labour Relations Board. The board publishes its decisions under the name of Ontario Labour Relations Board Reports. When I practiced personally before the board, I found a text *Ontario Labour Relations Board Practice* by Sack and Mitchell to be quite useful. The text is widely available in both legal and labour relations libraries. The Labour Relations Board may be contacted by letter at:

400 University Avenue
4th Floor
Toronto, Ontario
M7A 1T7

or by phone at 326-7500

I trust the foregoing is satisfactory.

4. Mr. Krall met with his lawyer within a week of this letter. At this time Mr. Coleman told him to pursue the matter on his own. Mr. Krall got married in August, 1991 and in late September, 1991 the union notified Mr. Krall that he was to attend school at Mohawk College in October. Mr. Krall refused to go and was suspended from the union on November 1, 1991. Mr. Krall contacted the Board in 1991 and was sent information outlining his rights. Mr. Krall worked for a two week period between Christmas and New Years and filed the complaint before me on January 23, 1992.

5. The parties agreed at the outset of the hearing on damages that prior to hearing detailed evidence concerning the actual damages owed by the union to Mr. Krall, it was appropriate for the Board to deal with two matters in a preliminary fashion. First of all, the union argued that Mr. Krall should have accepted the referral as an apprentice in June, 1991 and that his failure to do so meant that he had not properly mitigated his damages. Secondly, the union argued that Mr. Krall delayed unreasonably in filing his complaint and that the Board should take this delay into account in assessing damages.

6. In assessing the damages which flow from a breach of the Act the Board seeks to put the complainant in the same position he would have been had the breach not occurred. Any damages ordered are compensatory in nature, they are not punitive.

7. The common law doctrine of mitigation of damages was articulated in *Cockburn v. Trusts & Guarantee Co.* (1917) 37 DLR 701 at p. 702 as follows:

The principle upon which the appeal ought to be decided is expounded at length in the judgment of Lord Haldane, in *British Westinghouse Electric Co. v. Underground Electric Railways Co.*, [1912] A.C. 673, at pp. 689 and 690. After stating the general principle that when a contract is broken the injured party is entitled generally to receive such a sum by way of damages, as will, so far as possible, put him in the same position as if the contract had been performed--the damages being limited to those that are the natural and direct consequences of the breach--his Lordship proceeded as follows:-

"But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss ... "... this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business."

This doctrine has also been applied in arbitration decisions (See, *Re Ottawa West End Villa Ltd. and Ontario Nurses Association*, 15 LAC (2d) 417 and *Re Dominion Stores Ltd., and Retail Wholesale and Department Store Union, Local 414*, 18 L.A.C. (2d) 377) and by the courts in wrongful dismissal actions (see, *Mifsud v. MacMillan Bathurst Inc.*, 70 O.R. (2d) 701 and *Laakso v. Valspar Inc.*, 32 CCEL 72). In dealing with whether a refusal to accept an alternative position offered by the employer constituted a failure to make reasonable mitigation efforts, the court in *Mifsud*, *supra*, said:

The fact that the transfer to a new position may constitute in law a constructive dismissal does not eliminate the obligation of the employee to look at the new position offered and evaluate it as a means of mitigating damages. In all cases, comparison should be made to the contractual

entitlement of the employer to give reasonable notice and leave the employee in his current position while a search is made for alternative employment. Where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious (as in this case) it is reasonable to expect the employee to accept the position offered in mitigation of damages during a reasonable notice period, or until he finds acceptable employment elsewhere.

It must be kept in mind, of course, that there are many situations where the facts would substantiate a constructive dismissal but where it would be patently unreasonable to expect an employee to accept continuing employment with the same employer in mitigation of his damages.

8. The Board in *Jacmorr Manufacturing Limited*, [1987] OLRB Rep. Aug. 1086 while acknowledging that the duty to mitigate has some application, also noted that it must be adapted to proceedings pursuant to the Act.

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Mitigation - in general

11. In fashioning a remedy under section 89 [now 91] of the Act, the Board has historically been disposed to borrow from the common law of contract and apply a principle analogous to "mitigation", to reduce the compensation payable to an aggrieved party whose damages have been "artificially" inflated because he has not taken reasonable steps to reduce them. In the case of an employee unlawfully discharged, this usually implies some obligation to seek alternative employment. In *Little Brothers (Weston) Limited*, [1975] OLRB Rep. Jan. 83, the Board put it this way:

23. The grievor, however, is not entitled to any other compensation. When an innocent party experiences a breach of contract he is immediately shouldered with a duty to take reasonable steps to mitigate his losses. In other words, he must avoid avoidable losses and the justification for this duty stems from the policy that the purpose of damages in contract is compensation not penalization; (see E. Allan Farnsworth, *Legall Remedies for Breach of Contract* (1970), 70 Colum. L. Rev. 1,145). The Board has taken a similar stance in exercising its discretion under section 79 [now 89] of the Act to award compensation. It requires a complainant, who has been discharged, to take reasonable steps to mitigate his losses (see *Metropolitan Meat Packers Ltd.* 62 CLLC 16,230; *Murray Bros. Limited* [1969] OLRB Rep. Feb. 1,194; and *De Carlo Shoe Co.* [1965] OLRB Rep. June 224). The policy behind the imposition of this duty parallels that in contract. Section 79 used the word "compensation" and therefore if a duty to mitigate did not accrue to a grievor a monetary award given under section 79 would constitute something more than pure compensation. This is so in that the losses experienced by someone who does not attempt to mitigate are not, in a very real sense, all caused by the employer - a portion of the loss will stem from a grievor foregoing other income producing opportunities. To order an employer to compensate a grievor for this aspect of his losses would be to penalize the employer and section 79 is not designed to accomplish this end. If an individual wants to penalize an employer for a breach of the Act he must seek consent to institute a prosecution under section 90 [now 101] and, if granted, section 85, [now 96] upon the requisite proof, will accomplish the objective.

Similarly, in *Ernie's Signs Limited*, [1976] OLRB Rep. Aug. 404 the Board commented:

5. The purpose of ordering compensation in a case such as this is not to penalize the respondent but, as far as monetary compensation will allow, to put the grievor in the same position he would have been in if the violation of the Act had not occurred. There is, however, a duty which falls to the grievor and that is the duty to mitigate his loss. The common law doctrine of mitigation has been set out in the Canadian case of *Cockburn v. Trusts and Guarantee Co* (1917), 37 D.L.R. 701 at p. 702:

“The principle upon which the appeal ought to be decided is expounded at length in the judgment of Lord Haldane in *British Westinghouse Electric Co. v. Underground Electric Railways Co.*, [1912] A.C. 673, at pp. 683 and 690. After stating the general principle that when a contract is broken the injured party is entitled generally to receive such a sum by way of damages, as will, so far as possible, put him in the same position as if the contract had been performed - the damages being limited to those that are the natural and direct consequences of the breach - his Lordship proceeded as follows:”

“Their right to their livelihood was a matter of contract, and the body of legal principles so aptly named (until recently) the ‘law of master and servant’. But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss ... this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business.”

12. Each of these cases imports into the interpretation of the *Labour Relations Act*, certain common law principles “borrowed” from the law of contract; but it must be remembered that the common law position is *not* entirely analogous to the statutory context under review. At common law, human labour was merely a commodity - an article of commerce like any other. Workers could be readily disposed of, whether or not their employer had just cause, upon “reasonable notice” - which for manual workers was not much notice at all. Indeed, it is interesting to note that the Court decisions referred to in *Ernie’s Signs*, *supra*, either were, or heavily relied upon, cases involving a breach of contract for the *sale of goods*.

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14. This is not to say that the concerns underlying the *principle* of mitigation are entirely misplaced or have no application at all in the forum which we must administer. It is simply that one must remember that this is not an action for wrongful dismissal; but rather an effort to enforce *statutory* rights which rest upon an articulated *public policy* in favour of the establishment of collective bargaining relationships (see the Preamble to the *Labour Relations Act*). That difference was referred to in *P. J. Wallbank Manufacturing Company Ltd.*, [1980] OLRB Rep. Dec. 1797 at paragraph 4:

The Board has recently reaffirmed its position that a person who has been discharged has an obligation to take reasonable steps to mitigate his loss (see *Sutton Place Hotel*, [1980] OLRB Rep. Aug. 1250). In dealing with the common law duty to mitigate in the context of unlawful discharge cases, the Board must also keep in mind that, unlike at common law, a successful complaint almost always results in the reinstatement of the discharged employee. It would be shortsighted indeed to ignore the availability of this remedy and the frequency of its use when determining whether someone has taken reasonable steps to mitigate the loss. In other words, in an action for wrongful dismissal at common law, a discharged employee would be claiming an amount equal to his earnings for the period during which the court determines that he should have had notice of his discharge. He would not be entitled to reinstatement, and therefore has no need or interest to keep himself in a position where he can take up his old job again; on the contrary, his interest lies in picking up the pieces and embarking on a new enterprise as soon as possible. Where reinstatement is available as a remedy, and commonly awarded, it would be unrealistic to ignore that the discharged employee has every reason to believe that he may be returning to his old job. The interpretation of his obligation to mitigate must be considered in light of his obvious interest in keeping himself in a position to resume his former employment.

(See also: *Beckett Elevator* [1986] OLRB Rep. Nov. 1493).

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9. The circumstances in this case are somewhat unusual. Normally the duty to mitigate arises in cases before the Board in the context of a termination contrary to the Act. As was outlined in the decision dated August 19, 1992, the purpose of the union hiring hall is to ensure work is equitably distributed amongst the union membership. The union is essentially acting as an employment agency and assigns the work opportunities available to its membership. In this case, the actions on the part of the union which led to a finding of a breach of the Act resulted in the denial of employment opportunities to the complainant. As the broker of employment opportunities the union stands between the employer and potential employees. In essence, subject to limited exceptions the union determines who works, just as in the industrial setting, the employer determines who will work based on who it hires and who it fires. Therefore, just as the complainant would have had a duty to mitigate his damages if he had been directly employed and then fired, so does he have this obligation in the context of a hiring hall.

10. Therefore, in the context of this case, in order to mitigate his damages did Mr. Krall have an obligation to accept union referrals as an apprentice? The courts in *Mifsud, supra*, and *Laakso, supra*, were clear that each case must turn on its facts and what is reasonable must be assessed in each case. In this case had Mr. Krall accepted the referral as an apprentice he would have received lower wages and would have worked as an apprentice instead of a journeyman, a significant drop in status. In addition, Mr. Krall was afraid to accept a referral as an apprentice as he felt that if he did so it would jeopardize his claim that he was no longer an apprentice but a journeyman. Given his treatment by the union, this appears to me to be an entirely reasonable apprehension. Finally, and perhaps most importantly, the Board has found that the actions of the union in arbitrarily forcing Mr. Krall to become an apprentice was a breach of the Act. In furtherance of this breach they sought to refer him to work assignments as an apprentice. Surely Mr. Krall cannot be expected to go along with a referral when it is the very act of this referral which he alleges is a violation of the Act. Therefore, Mr. Krall's concern and his refusal to accept the job referral as an apprentice was not inappropriate. Mr. Krall was under no obligation to accept the work referral on June 3, 1991 as an apprentice and his refusal to do so cannot be considered as a failure to mitigate his damages. This was the only work referral offered to Mr. Krall, the union made no more efforts to refer him to work after June 3, 1991.

11. The union has also raised concerns with regard to delay in the filing of the complaint. In dealing with the issue of delay the Board wrote in part in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420:

...

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it -- including the employees -- are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily [sic] settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

...

22. A perusal of the Board cases reveals that there has not been a mechanical [sic] response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability [sic] or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are over-riding public policy considerations, that limit should be measured in months rather than years.

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The Board recently dealt with the issue of delay in *Trelford Automobile Limited*, [1991] OLRB Rep. Oct. 1225 and stated:

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15. We turn next to the delay in filing the complaint. The Board's approach to delay has been explained most frequently in its decisions on requests to dismiss for undue delay in filing complaints. The Board has explained on numerous occasions that it does not take a mechanical approach to delay. If the delay is extreme, the complaint may be dismissed. If the complaint proceeds, and is successful, the Board may take any unreasonable delay into account when assessing compensation. See, among others, *Hayes Dana Limited*, [1968] OLRB Rep. April 1989; *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420; *Marshall-Globe Canada Ltd.*, [1982] Jan. 113; *George Hinkson*, [1987] OLRB Rep. Oct. 1246; *Roma Auto Metal Iron Limited*, [1969] OLRB Rep. Oct. 885; *Decor Wood Specialties Limited*, [1974] OLRB Rep. March 136; *Ernie's Signs Limited*, [1976] OLRB Rep. August 404. Here, there was no request to dismiss but the matter was raised in the context of argument on the quantum of compensation.

16. As the reported cases indicate, the Board has taken into account whether the delay is explained and such matters as lost settlement opportunities, any prejudice to the other party, cessation of union representation and whether the complainant was letting time run in order to increase a claim. It has acknowledged that some time must be allowed to consult and to ascertain the strength and weakness of a case. In a unionised context, in *Ernie's Signs Limited*, *supra*, the Board accepted that the principle of mitigation extends to the reasonableness of the union's efforts to redress the alleged wrongdoing. In *Sonic Transport Systems Limited*, [1981] OLRB Rep. Oct. 1483 the standard applied was when would the complaint have been filed if counsel and the client had proceeded with due diligence. Each case turns on its facts.

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12. Mr. Krall was made aware of his rights in the beginning of August, 1991. He met with his counsel who explained the contents of the letter from the Ministry of Labour. The only reason put forward by Mr. Krall for his inaction in August was the fact that he was getting married. While this might account for a certain amount of preoccupation on his part, I cannot accept that he did not have the few minutes it would have taken to at least start the process of filing a complaint by contacting the Board and requesting the appropriate forms and information. Mr. Krall did not take this initial step until November, 1991. It then took him until January 23, 1992 to file the complaint. Mr. Krall's attitude was quite cavalier on the issue of delay. It is obvious that he was content to sit back and collect his unemployment insurance benefits and that he did not feel any obligation to initiate his complaint in a timely fashion.

13. In dealing with the effects that delay may have on compensation the Board in *Decor Wood Specialties Limited*, [1974] March. 136 stated:

... In such circumstances where delay can be attributed to one party to a Board proceeding, it seems obvious to us that the other party should not be prejudiced. The Board does not pretend to set a fixed guideline with respect to what is a reasonable time for an aggrieved to initiate proceedings after an alleged violation of the Act. For example, it is the Board's opinion that a complaint should not be launched frivolously and without consideration of a reasonable chance for success....

Therefore, on the facts of this case, is Mr. Krall entitled to full compensation or is the delay in filing the complaint unreasonable?

14. It is not appropriate that the union should bear what could be significant costs caused by the complainant's delay in this case. In taking so long to bring forward his complaint the complainant has failed to act reasonably to mitigate his damages. He has no reasons for the delay from early August to mid-January other than that he was getting married in August and worked for a couple of weeks in late December to early January. It seems appropriate in the circumstances to reduce whatever damages Mr. Krall might be entitled to as a result of this delay. Although it is difficult to assess how long it would take a reasonable person to prepare and file a complaint, it appears to me that Mr. Krall should have been in a position to file his complaint earlier than he did so, had he acted with due diligence. He did not act diligently, in fact he took no action from August until November, and the filing of the complaint was therefore unreasonably delayed. After having considered this matter carefully I would conclude that Mr. Krall unreasonably delayed the filing of this complaint by approximately three months. This delay constitutes a failure to mitigate his damages. At this point it is not clear what the damages owed by the union to Mr. Krall are and it is not yet clear what the effect of this delay will be. The Board has not heard any evidence which would enable me to specifically quantify the damages. However, by way of guidance to the parties, I would reiterate that Mr. Krall is entitled to be placed in the position he would have been in had the breach of the Act not occurred, no more and no less.

15. This matter is scheduled to continue on February 1, 1993, if necessary. I therefore direct the parties to meet prior to this date with a view to reaching an agreement on the damages. The union is hereby directed to provide Mr. Krall the opportunity to review the union's records to determine what job referrals he would have been entitled to, as a journeyman, from February 1991 when he initially put his name on the union's out-of-work list, to the date his name was reinstated to the out-of-work list pursuant to the first decision in this case. The Board at this point has heard no evidence concerning the work which was available nor have I heard how many journeymen were on the out-of-work list at any given time. Obviously these are relevant factors in any quantification of Mr. Krall's damages. While it may be difficult to determine for certain what referrals Mr. Krall would have obtained, it appears to me that if both parties act in a reasonable fashion it should be possible to reconstruct Mr. Krall's job history and to arrive at an appropriate figure to compensate Mr. Krall. If this is not possible, perhaps the parties can agree on another method for approximating Mr. Krall's damages. How his delay in filing the complaint will impact on the quantum of damages he is otherwise entitled to, is not clear.

16. If the parties are unable to agree on the quantum of damages I will remain seized of this issue and they should come to the hearing on February 1, 1993 prepared to call evidence and argue this point. However, I would urge them to make every effort to reach agreement and to put their differences behind them.

17. Counsel for the union argues that as the union is not Mr. Krall's employer the damages that they owe Mr. Krall are not lost wages. He argued that the union is simply paying damages as a result of the violation of the Act. Counsel argued therefore that all of Mr. Krall's earnings, including his unemployment insurance benefits should be set off against the union's damages. The union

owes as yet unquantified damages to Mr. Krall but if the parties agree on the appropriate amount, or the Board determines the issue, it is not for the Board to determine the applicability of the Unemployment Insurance Regulations to this situation. Whether or not Mr. Krall is required to repay the unemployment insurance commission is not an issue I need decide (even if I had the jurisdiction to do so) and I decline to make any directions on this point.

18. Unless the parties advise the Registrar to the contrary, this matter will continue on Monday, February 1, 1993, in the Board Room, 6th Floor, 400 University Avenue, Toronto, Ontario, commencing at 9:30 a.m. If the parties agree that the assistance of a Labour Relations Officer might be helpful they should contact the Board's Manager of Field Services.

2336-92-R Eric de Buda, Applicant v. The Society of Ontario Hydro Professional and Administrative Employees, Respondent v. **Ontario Hydro**, Intervener #1; Robert S. Higgins, Intervener #2

Termination - Voluntary Recognition - Applicant asserting that trade union was not, at the time it entered into a voluntary recognition agreement with employer, entitled to represent employees in the bargaining unit - Board satisfied that results of ratification vote showing that vast majority of employees in the bargaining unit supported the voluntary recognition agreement and the union - Application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *Eric de Buda* on his own behalf; *James Hayes*, *Darlene Booth*, *Mario Germani* and *James Bell* for the respondent; *G. F. Luborsky*, *I. A. Starastas*, *J. Browne* and *S. Foti* for Ontario Hydro; *Robert S. Higgins* on his own behalf.

DECISION OF THE BOARD; January 13, 1993

1. This is an application for a declaration terminating the bargaining rights of the respondent trade union (the "Society"). Upon hearing the evidence and representations of the parties at a hearing on December 18, 1992, the Board dismissed the application in a brief oral ruling.
2. We note that Robert Higgins, a professional engineer employed by the intervener Ontario Hydro, sought party status at the hearing. No one opposed his request and he was therefore granted party status (as an intervener). However, Mr. Higgins chose to leave the hearing at the lunch break, leaving a short written submission for the Board's consideration.
3. We also note that the complainant, who is a professional engineer employed by Ontario Hydro, is not a lawyer but chose to represent himself at the hearing. He was entitled to do so, of course. The Board is sensitive to the difficulties which a person who appears before it without representation may encounter and generally, as we did in this case, permits an unrepresented person somewhat greater latitude in the manner in which s/he conducts his/her case than is generally afforded to counsel.
4. However, the Board is an adjudicative quasi-judicial tribunal and not an investigatory body. The Board is a neutral adjudicator of labour relations disputes which are brought before it.

The Board is *not* an advisor or an investigator in that respect. Consequently, where the word “inquiry” appears in the legislation, it refers to a quasi-judicial proceeding, not an investigation.

5. The “rules” for proceedings before the Board are, as they must if the proceeding is to be fair, the same for all parties. Consequently, the rules of procedure, fairness, evidence and law applicable to the matter(s) in issue in a proceeding before the Board are the same for all parties, whether represented or not. Choosing to proceed without counsel or other representation, or otherwise failing to inform oneself, does not relieve a party of the obligation to prepare and present its case. A party which chooses not to obtain the appropriate representation or advice must live with the consequences of that decision. A party cannot expect that it will be in a better position procedurally or in law because it has chosen to proceed before the Board without representation or advice.

6. We find it appropriate to make these comments because it was apparent that the applicant did not fully understand the process or what was expected of him. In this case, as in all others, the Board’s decision was based upon the evidence and representations of the parties presented at the hearing. The Board cannot base a decision on assertions for which there is no evidence, or on evidence which is either irrelevant or not before it.

7. This application was filed, litigated and determined under section 61 of the *Labour Relations Act* as it then was (that is, prior to January 1, 1993 when the Act was amended by S.O. 1992, c. 21) which provided that:

61.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

8. In making the application, the applicant asserted that the respondent Society was not, at the time it entered into a voluntary recognition agreement with Ontario Hydro, entitled to represent the employees in the bargaining unit defined by that voluntary recognition agreement. The applicant also specifically alleged that:

The composition of the bargaining unit is inappropriate: SOHPAE has not excluded employees who perform managerial functions. Professionals Engineers were not given a separate vote for their inclusion. Ratification vote was handled improperly by SOHPAE (not by an independent firm). Ballots were distributed by delegates and returned to SOHPAE, via unprotected internal mail, in see-through “secrecy” envelopes.

The applicant elaborated on his allegations in a letter to the Board dated December 14, 1992.

9. The Society, Ontario Hydro and the Coalition to Stop the Certification of the Society (which, as its name suggests, was a group which opposed the respondent's attempt to be certified by the Board as the bargaining agent for certain employees of Ontario Hydro) were involved in lengthy and complex litigation in Board File Nos. 2241-86-R and 1740-90-R. It is common ground that the respondent and Ontario Hydro eventually negotiated a voluntary recognition agreement dated November 13, 1992. This voluntary recognition agreement included the following recognition and ratification clauses:

1.0 Recognition Clause

Pursuant to section 16(3) of the Ontario Labour Relations Act, Ontario Hydro agrees to recognize the Society as the exclusive bargaining agent for the "employees" defined as follows:

"All employees employed by Ontario Hydro in the Province of Ontario as supervisors, professional engineers, engineers-in-training, scientists, professional, administrative and associated employees save and except:

- "a) those persons included on the Executive Salary Roll and above;
- "b) employees in bargaining units for which any trade union holds bargaining rights as of the signing of this Agreement;
- "c) those persons who perform managerial functions as distinct from supervisor functions. An employee is performing managerial functions if:
 - i) she/he perform managerial functions such as hiring, promotion, performance increase, discharge, etc. over other employees in the bargaining unit and;

she/he is required to spend the majority of his/her time performing managerial duties and;

she/he supervises at least seven (7) employees (directly or indirectly) on a regular and continuous basis.
 - ii) she/he supervises employees who are excluded from the Society under (c)(i), (d), (e) or (f).
- "d) employees who are primarily employed in a confidential capacity affecting the terms and conditions of employment or Ontario Hydro staff;
- "e) employees whose full-time duties are security work;
- "f) employees who are members of a profession entitled to practice in Ontario and who are employed in a professional capacity where the Ontario Labour Relations Act excludes such persons from coming under the Act by virtue of their profession."

2.0 Clarity Note

For the purposes of clarity, the bargaining unit set out above:

- 2.1 Includes:
 - a) All regular, probationary, part-time and temporary employees whose func-

tions are included in the classifications paid from Salary Schedules 01, 02, 04, 05, 07, 08, 09 and 18; and

- b) All employees paid from Salary Schedule 13 (Nurses), Salary Schedule 0.3 (System control Operators) and Salary Schedule 06 (Helicopter Operator Supervisors), except employees excluded by virtue of 1.0 of this agreement, will be entitled to vote to determine if they wish to be represented by the Society. If the majority of eligible employees voting on any schedule vote in favour of being represented by the Society, eligible employees on that schedule will be represented by the Society. The vote will be conducted by the Society and Ontario Hydro by secret ballot.

2.2 Excludes employees in accordance with 1.0(c) above as follows:

- a) M&P (Schedule 01) - in salary classification MP4 (or higher) rated by he Plan A Point System of Job Evaluation January 1988 ("Plan A"), or its equivalent, carrying "Nature of /supervision" Degree 4 (or higher) or its equivalent and "Numbers Supervised" Degree 3 (or higher) or its equivalent who normally supervise other Society represented employees.
- b) FM&P (Schedule 02) - who normally supervise other FM&P employees and who normally supervise at least seven (7) employees directly or indirectly.
- c) TMS and TS (Schedules 08 and 07) - who normally supervise other TMS or TS positions and who normally supervise at least seven (7) employees directly or indirectly.
- d) OSS (Schedule 05) - who normally supervise other OSS positions and who normally supervise at least seven (7) employees directly or indirectly.
- e) Supervising Electrical Inspectors (Schedule 09) - who normally supervise other SEI positions and who normally supervise at least seven (7) employees directly or indirectly.
- f) Area Managers

2.3 Excludes employees in accordance with 1.0(d) above as follows:

- a) Employees paid from Salary Schedule 01 rated under Plan A as having "Staff Responsibility" Degree 4 (or higher) or its equivalent and MP6 employees as having "Staff Responsibility" Degree 3 (or higher) or its equivalent.
- b) Employees in the Executive Office;
- c) Employees in the Office of the General Counsel and Secretary including the Law Division except Corporate Official Records Analysts.
- d) Positions currently listed in Agreement RS-1 dated October 11, 1990.
- e) Human Resource trainee positions on Schedule 04.

...

11.0 RATIFICATION

The Society Executive recommends acceptance of this agreement to its members and the agreement shall become effective upon the date of ratification. Persons eligible to vote will include all employees who will be represented by the Society under this voluntary recognition agreement. The vote will be conducted by secret ballot.

10. The voluntary recognition agreement specified that it was to come into effect “on the date of ratification”.

11. Subsequently, a ratification vote was held. The result of the vote was reported as being in favour of ratification by a margin of 4,081 to 650, and notice of ratification in that respect was given by the Society to Ontario Hydro by letter dated January 16, 1992. Since then, the Society and Ontario Hydro have conducted themselves in accordance with the terms of the voluntary recognition agreement and they are currently in the final stages of bargaining for a collective agreement.

12. The evidence reveals that it was the Society which insisted that the voluntary recognition agreement be subject to ratification by the persons affected by it. The bargaining unit defined by the voluntary recognition agreement includes persons who had previously been represented by the respondent and a relatively small group which had not.

13. The ratification vote was conducted by mail. A voter’s list and voting materials were prepared and distributed.

14. There were three packages prepared for distribution to the eligible voters. One was for members of the respondent which it had previously represented. It included a covering letter addressed “Dear Fellow Society Member” signed by the respondent’s President, a document entitled “Summary and Explanation of Key Clauses in voluntary recognition agreement”, a copy of the voluntary recognition agreement itself, voting instructions, a ballot asking “Do you accept the “Memorandum of Settlement on a voluntary recognition agreement” as set out in full in the attachment to this ballot?” with “Yes” and “No” boxes below it, a “secrecy” envelope into which the completed ballot was to be inserted, and a second envelope into which the secrecy envelope was to be inserted for return to the respondent’s office in Toronto where the ballots were to be counted.

15. A second package was for non-Society members previously represented by it. Except for the covering letter, its contents were the same as the package sent to members as aforesaid. The covering letter was addressed “Dear Fellow Employee” and signed by the Society’s president. Though structured differently, the covering letter contained similar information to that contained in the one sent to Society members.

16. A third package was sent to Ontario Hydro employees who were not Society members and who had not previously been represented by the Society, but who the voluntary recognition agreement contemplated would be included in the bargaining unit. It contained a covering explanatory letter signed by both the Society’s President and an Ontario Hydro representative, the same summary of the voluntary recognition agreement sent to the other eligible voters, a copy of the voluntary recognition agreement, voting instructions, a two part ballot, a secrecy envelope for the completed ballot, and a transmission envelope addressed to “Corporate Mailing, HLC 022, Attention: Operating Supervisor”. This package was sent to eighty-one persons: Fifty-seven in “System Control (Schedule 03)”, Twenty-two “Nurses (Schedule 13)” and two “Helicopter Pilot Supervisors (Schedule 06)”. Each such person was asked, first “Do you wish to be represented by the Society of Ontario Hydro Professional and Administrative Employees in your employment relationship with Ontario Hydro?; and, second, “Do you accept the “Memorandum of Settlement on a voluntary recognition agreement” as set out in full in the attachment to this ballot?”

17. The transmission envelopes in all three packages indicated “Inter Office Mail” on their face, but envelopes which were hand-delivered or sent by regular mail post-marked January 13, 1992 (the voting deadline date) or earlier were accepted.

18. The Society, Ontario Hydro and the Coalition were represented by scrutineers when the ballots cast were counted. The names on the transmission envelopes were compared to the voters list and the secrecy envelopes containing the ballots of eligible voters were removed and, at a subsequent stage, counted. By letter dated January 16, 1992, the Chief Returning Officer reported to the Society as follows:

THE
SOCIETY

REPORT OF VOTING RESULTS
FOR VOLUNTARY RECOGNITION
AGREEMENT

January 16, 1992

Mr. M. D. Germani
Secretary-Treasurer
Society of Ontario Hydro
Professional & Administrative Employees

Dear Mr. Germani:

Please be advised that the results of the referendum to ratify the proposed voluntary recognition agreement, dated November 13, 1991, are as follows:

YES	4081	NO	650
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A total of 4796 staff voted of the 7811 eligible voters who will be employees in the bargaining unit defined in the voluntary recognition agreement. The voters included 1136 non-members (i.e. Mail groups 3,7,4,5&6) of whom 636 voted in favour of the agreement. The Voters' List is attached. A total of 65 ballots could not be validated due to improper completion of the outer envelope or ballot. An additional 45 ballots were received from employees in positions where there is no agreement on inclusion/exclusion, and these have been segregated and not opened.

As of this report, a further 176 ballots could not be counted as they were not postmarked January 13, 1992 or earlier and were received after that date.

J. Browne

Chief Returning Officer

By letter of the same date, the Society gave Ontario Hydro notice of ratification as follows:

THE
SOCIETY

January 16, 1992

Mr. W.S. O'Neill
Management Co-Chair - JSMC
Director, Staff Relations Division
H2 A1

Dear Bill:

voluntary recognition agreement

I wish to formally advise you that the Society has ratified the Memorandum of Settlement on a voluntary recognition agreement dated November 13, 1991. The report of the Chief Returning Officer is attached. (A copy of the Voters' List of all those who will be included in the bargaining unit, with appended lists of those who will be excluded and those employees whose status is

still undetermined, was prepared in consultation with Management Staff Relations Department and was provided to Mr. Starasts last week).

I also wish to point out that our records confirm that the Society has signed up 4,774 members of the total of 7,811 employees on the Voters' List of those who will be in the bargaining unit.

Also, consistent with 2.1 of the agreement, we have been advised separately that employees paid from salary schedule 13 (Nurses), salary schedule 06 (Helicopter Operator Supervisors) and salary schedule 03 (System Control Operators) have voted in favour of being represented by the Society and therefore these employees were added to the Voters' List of those who will be in the bargaining unit.

Yours truly,

D.M. Booth

Senior Staff Officer

Subsequently, in a January 17, 1992 edition of "the Society Bulletin" distributed to employees including the applicant, the Society published the results of the ratification vote to employees.

19. By letter dated February 14, 1992, the Coalition wrote to the Board in response to the Society's request for leave to withdraw its application for certification in Board File No. 1714-90-R. The Coalition complained that it had been denied the use of Hydro's internal mail system (presumably with respect to the voluntary recognition agreement ratification vote), of voting irregularities including an alleged lack of ballot confidentiality, that the position of affected Professional Engineers and section 6(4) of the Act had been ignored and that managerial staff have been included in the bargaining unit defined by the voluntary recognition agreement. However, the Coalition also confirmed that it "... did witness part of the ballot counting process at the invitation of the Society. Had this not been done, we would have had serious misgivings over the entire process...", which we take to mean that its voting process concerns had been alleviated. The Coalition also specifically stated that it did not intend to pursue any of these issues before the Board and agreed to the withdrawal of the application in Board File No. 1714-90-R.

20. The applicant was a member of the Coalition and was aware of its complaints and decision not to pursue them.

21. There is no obligation to submit a voluntary recognition agreement to affected employees for ratification. Nor is this often done. In this case, however, the voluntary recognition agreement between Ontario Hydro and the Society was made subject to ratification by the employees in the bargaining unit defined in it at the instance of the Society. We were satisfied that the voting procedure adopted in that respect was a fair, reasonable and appropriate one in the circumstances. We were also satisfied that the results of the ratification vote are a reliable indicator of the true wishes of the employees in the bargaining unit. There was no evidence which supported the complainant's allegation of impropriety in that respect. Nor was there any evidence to support the complainant's assertion that *any* affected employee was confused, misled or misinformed about the voluntary recognition agreement or the ratification vote.

22. There was no evidence offered in support of the assertion that the bargaining unit defined by the voluntary recognition agreement includes persons who are not "employees" within the meaning of the *Labour Relations Act*. In that respect, however, the mere presence in the bargaining unit of persons who exercise managerial functions would not, by itself, serve to invalidate the voluntary recognition agreement or the ratification vote, or any collective agreement which may subsequently be entered into between Ontario Hydro and the Society.

23. In a decision in the application for certification in Board File No. 2241-86-R (Ontario Hydro 1989 Board Reports February 185), the Board found the Society to be a “trade union” within the meaning of the *Labour Relations Act*. The Board specifically found that the fact that the respondent may have members or officers who exercise managerial functions does not mean either that it is not a trade union, or that it could not be certified under the Act. As that same decision suggests, the mere fact that the respondent may have members or officers who exercise managerial functions does not mean that it cannot enter into a voluntary recognition agreements or collective agreements under the *Labour Relations Act* (see also, *Chrysler Canada Ltd.*, [1975] OLRB Rep. Nov. 852; *Children’s Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651; *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279; *Etna Foods of Windsor Limited*, [1986] OLRB Rep. June 710).

24. Nor were we persuaded that there was any merit to the assertion that the Society was not entitled to represent the employees in a bargaining unit defined by the voluntary recognition agreement because the professional engineers among those employees were not permitted to vote separately.

25. Section 6(4) of the *Labour Relations Act* provides that:

(4) A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but, the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of the professional engineers wish to be included in the bargaining unit.

26. This provision governs the Board’s certification proceedings. It does not extend to voluntary recognition agreements. In any event, the Society was founded by a group of professional engineers and scientists. It subsequently expanded to include other employees in the 1970’s and again in the 1980’s. Each expansion of membership was ratified by a vote of the then membership. The Society has for many years represented its membership, including the professional engineers, with respect to employment matters under what has been referred to as a single “Master Agreement” with Ontario Hydro. Further, the professional engineers voted, as a separate group, in favour of the Society applying for certification in 1986. Indeed, the evidence indicates that the Society has enjoyed, and continues to enjoy, the support of a majority of professional engineers in the bargaining unit herein.

27. Finally, the results of the ratification vote show that a vast majority of the employees in the bargaining unit supported the voluntary recognition agreement and the Society at the time the voluntary recognition agreement was entered into. One cannot assume, as the applicant does, that those who chose not to vote or whose ballots were spoiled were against either the Society or the voluntary recognition agreement. It is common enough for eligible voters to not cast ballots and, unless stipulated otherwise, results of a vote are determined by the ballots which are cast, not those which are not. In any event, even if all the eligible voters who did not cast ballots were deemed to have voted against it, the voluntary recognition agreement would still have been ratified, albeit by a slight majority.

28. In short, we were satisfied that the Society was entitled to represent the employees in the bargaining unit at the time it entered into the voluntary recognition agreement herein with Ontario Hydro. There was nothing in the evidence which suggested otherwise, or which suggested that there was any reason to hold any confirmatory representation vote(s) in that respect.

29. The application was therefore dismissed as aforesaid.

2486-92-R Riverview Manor Nursing Home, Applicant v. Ontario Nurses' Association, Responding Party

Hospital Labour Disputes Arbitration Act - Termination - Employer seeking to terminate union's bargaining rights for failure to commence bargaining within 60 days of giving notice to bargain - Union not pursuing collective bargaining in a timely manner without reasonable explanation, but continuing to have contact with and pursue grievances on behalf of bargaining unit employees - Board directing representation vote

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members R. W. Pirrie and R. R. Montague.

APPEARANCES: Loretta P. Merritt and Fraser Wilson for the applicant; George P. Rejminiak, John Vance, Louise McKay, Mary Hodder and Marie Calberry for the responding party.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER R. W. PIRRIE: January 19, 1993.

1. This is an application for a declaration terminating certain bargaining rights held by the Ontario Nurses' Association (the "ONA"). It was made and litigated prior to the coming into force, on January 1, 1993, of amendments to the *Labour Relations Act*.

2. The application is made under section 60(2) of the Act, which provides that:

60. (2) Where a trade union that has given notice under section 14 or section 54 or that has received notice under section 54 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

3. The application came on for hearing on December 18, 1992. The parties were prepared to call evidence but at the Board's suggestion were able to agree that, with the exception of one small point, the application could be argued and disposed of by the Board on the basis of the materials filed. The Board then heard the evidence of the parties on the one point (relating to paragraph 19 of the ONA's reply), and their representations.

4. The ONA was certified as the exclusive bargaining agent for certain employees of the applicant in May, 1988. Because the parties could not come to an agreement on some of the issues between them in their bargaining for a first collective agreement, the matter was submitted to arbitration pursuant to the provisions of *The Hospital Labour Disputes Arbitration Act*. The resulting interest arbitration award, for a collective agreement which expired on June 30, 1990, was not finalized until May 30, 1992 (the date appearing on an "Addendum Award" issued by the interest board of arbitration). It was not until July 21, 1992 that the ONA gave notice to bargain for a new collective agreement and suggested meeting in late August or early September 1992 to begin negotiations. The applicant employer responded by telephone on July 31, 1992 and suggested September 15, 16 or 17, 1992 as possible meeting dates. By letter dated August 19, 1992, the applicant confirmed that telephone call, and indicated that it had received nothing in response to its suggestions with respect to dates and requested a "prompt" response from the ONA.

5. The ONA replied by letter dated August 28, 1992. It explained that it had not responded to the applicant's offer of dates because of its internal transfer of responsibility for the

bargaining unit in question. The ONA advised that it would be in touch regarding negotiations in early October 1992.

6. Nothing more was heard from the ONA trade union until late October 1992, when, by letter dated October 28, 1992 the responding party advised the applicant of an employee's "leave of absence for ONA business". There is nothing in either this letter, or in any other communication with the applicant up to the December 18, 1992 date of hearing herein, in which the responding party addressed or even mentioned bargaining for a new collective agreement to the applicant.

7. Though trite, it is perhaps necessary to note that labour relations delayed are labour relations defeated and denied (*Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild, Local 205 OLRB et al*, [1977] 1 A.C.W.S. 817 (Ontario Court of Appeal)), and that delay in labour relations matters often works unfairness and hardship (*Re United Headwear and Builmore/Stetson (Canada) Inc.*, (1983) 41 O.R. (2d) 287). This is as true, for collective bargaining as it is for other labour relations matters. Further, section 60 of the Act provides specific statutory recognition that delay in collective bargaining is harmful to a collective bargaining relationship. It operates, in conjunction with a statutory obligation to bargain in good faith, to require a trade union to pursue collective bargaining in a timely manner or face the prospect of losing its bargaining rights in that respect.

8. The *Labour Relations Act* grants rights to and imposes obligations on employees, trade unions and employers. The purpose of section 60 is to protect an employer and employees from a trade union which fails to pursue collective bargaining in a timely manner (*Dominion Stores Ltd.* 56 C.L.L.C. ¶18,047; *Medi-Park Lodges Inc.*, [1979] OLRB Rep. Oct. 1007; *Fuller's Restaurant*, [1981] OLRB Rep. Feb. 156; *Prescott Machine and Welding Inc.*, [1983] OLRB Rep. Feb. 250). In circumstances in which a trade union has not complied with section 60, it must explain its failure to do so. If a trade union has sought to bargain soon after the times specified in section 60, or provides a reasonable explanation for its delay, an application under section 60 will generally be dismissed (*Trizec Equities Ltd.*, [1978] OLRB Rep. Feb. 189; *Mohawk Construction Limited*, [1981] OLRB Rep. Aug. 1156). Where a trade union has not pursued collective bargaining in a timely manner without reasonable explanation, the Board will generally terminate its bargaining rights (*Darrigo's Supermarkets Ltd.*, [1982] OLRB Rep. Jan. 32; *Fuller's Restaurant, supra.*). In cases where a trade union has failed to bargain for a substantial period of time without reasonable explanation, but has demonstrated an interest in actively representing the bargaining unit employees, the Board has ordered a representation vote (see, for example, *F.C.M. Construction Limited*, [1982] OLRB Rep. May 670).

9. In this case, the ONA did nothing of any substance to pursue collective bargaining with the applicant after giving notice to bargain on July 21, 1992 (which notice was itself rather late in coming). In our view, the ONA's internal re-alignment of collective bargaining responsibilities for the affected bargaining unit does not constitute a satisfactory explanation for its failure to do so, and was itself rather tardy. There is nothing before the Board which even suggests that either the applicant employer or the bargaining unit employees have in any way caused or contributed to the delay in collective bargaining. On the other hand, the material before the Board indicates that the responding party has continued to actively represent the bargaining unit employees in their employment relations with the applicant in that it pursued the cumbersome process which led to the now long expired first collective agreement between the parties, and has continued to have contact with and pursue grievances on behalf of the bargaining unit employees.

10. We are satisfied that it is appropriate, in the circumstances herein, to let the affected employees have their say in the matter. We therefore find it appropriate to exercise our discretion

under section 60(2) of the Act to direct that a representation vote be taken among those employees.

11. We therefore direct that a representation vote be taken of all registered and graduate nurses employed in a nursing capacity by Riverview Manor Nursing Home, save and except the Director of Nursing and persons above the rank of Director of Nursing, on the date hereof who are so employed on the date the vote is taken.

12. Voters will be asked to indicate whether or not they wish to continue to be represented by the Ontario Nurses' Association in their employment relations with Riverview Manor Nursing Home.

13. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER RENE R. MONTAGUE: January 19, 1993

I concur with the above but would observe that one can easily see how the Ontario Nurses Association can fall into a sense of false security in being tardy with time limits. When the Ontario Nurses Association was certified in May of 1988 and the first Collective Labour Agreement was submitted to arbitration pursuant to provisions of *The Hospital Labour Dispute Arbitration Act*, it took until May 30, 1992 to finalize the collective agreement when in fact it had already expired on June 30, 1990. Truly in my opinion this alone is a travesty.

2476-89-R; 2477-89-R; 2478-89-R; 2479-89-R; 2480-89-R Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services, and **St. Leonard's Society of Metropolitan Toronto**, Respondents; Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services, and Community Liaison Services, Respondents; Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services, and Black Inmates and Friends Assembly, Respondents; Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services, and Streetlink Incorporated, Respondents

Bargaining Rights - Crown Transfer - Ministry of Correctional Services contracting with several community organizations to provide various services to inmates including discharge planning, cultural liaison, and counselling - Whether each contract constituting transfer of part of Crown's "undertaking" to the community agency - Board not persuaded that the right to perform particular services created by subcontract is "part" of Crown's "undertaking" to which bargaining rights attach or which create successorship on execution of contract - Applications dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members W. H. Wightman and D. A. Patterson.

APPEARANCES: *D. Wright for the applicant OPSEU; M. Fleishman for the Crown/Ministry of Correctional Services; P. J. Falzone for Streetlink Incorporated; D. C. Daniels for the St. Leonard's Society; B. Loewen for the Black Inmates and Friends Assembly; no one appearing for Community Liaison Services.*

DECISION OF R. O. MacDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER W. H. WIGHTMAN; January 14, 1993

1. These are applications under the *Successor Rights (Crown Transfers) Act* which were scheduled for hearing together because they raise similar legal issues. They are part of a broader grouping of proceedings, all of which involve the application of the *Crown Transfers Act* to certain contractual relationships between the Crown and employers governed by the Ontario *Labour Relations Act*. Because these cases involve similar legal themes, the Board's decisions in these matters are being released contemporaneously.

2. In each of the current cases, the Crown has entered into a contract with a community organization. In each case, the Crown buys services which the agency provides, with its own personnel, in accordance with the terms of the contract. The parties to that agreement characterize their relationship as purely contractual: money passes from the Crown to the agency, and, in return, services are provided to the Crown by that agency. The relationship is economic and arms length. The agency does not draw its essence from the Crown, nor has it acquired from the Crown the elements or personnel necessary to fulfil the contract.

3. OPSEU contends that each of these contracts constitutes a transfer of part of the Crown's "undertaking" to the community agency - with the result that OPSEU's bargaining rights and collective agreement attach to the agency employees when they are doing the work contemplated by the contract. OPSEU asserts that it represents those employees when they are doing that work, and that their terms and conditions of employment must be those prescribed in the civil service collective agreement. To illustrate: three employees of the respondent Black Inmates and Friends Assembly ("BIFA") spend, between them, some 16 hours at the Metro East Detention Centre providing services prescribed in the 1989 contract with the Crown. OPSEU asserts that while so engaged, they are represented by OPSEU, and their terms and conditions of employment must conform to the OPSEU collective agreement with the Crown. That agreement covers the civil servants whom OPSEU represents pursuant to the *Crown Employees Collective Bargaining Act*, and among those civil servants are Crown employees of the Ministry of Correctional Services ("MCS") working in correctional institutions.

4. OPSEU does not claim that any civil servant/OPSEU member has been "privatized", or has lost a job. Nor is there any evidence that any civil servant/OPSEU member has been otherwise disadvantaged because of the subcontract. Indeed, the "work" involved in some of these contracts does not always amount to a full-time job for a Crown employee, and is sometimes mixed with volunteer services beyond the scope of the contract. Nevertheless, OPSEU contends that "work" which is ordinarily done, or similar to that done, by civil servants is now being done by employees of the community agency. It is the alleged "movement" of this "work opportunity" from the Crown to the subcontractor that OPSEU argues is a "transfer" to which the *Crown Transfers Act* applies. In OPSEU's submission, a "part" of that Crown "undertaking" - the work opportunities - has been transferred to the subcontractor, and OPSEU's bargaining rights necessarily follow. None of the employees are members of OPSEU or have had any previous connection with OPSEU or the civil service.

5. The terms of the commercial arrangements will be set out in more detail below. At this stage, it may be useful to set out certain sections of the *Crown Transfers Act*:

- 1.-(1)(a) "bargaining agent" means an employee organization that has representation rights under the *Crown Employees Collective Bargaining Act* or a trade union or council of trade unions that is certified as a bargaining agent under the *Labour Relations Act*;

• • •

- (f) "transfer" means a conveyance, disposition or sale;

• • •

- (h) "undertaking" means a business, enterprise, institution, program, project, work or part of any of them;

- 2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

• • •

- 4.-(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause (a);
- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
- (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
- (ii) any bargaining unit defined in any collective agreement;
- (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
- (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

- (2) Where an undertaking is transferred from the Crown to an employer or from an employer to

the Crown, any person, employee organization, trade union or council of trade unions may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown,

- (a) within sixty days after the transfer of the undertaking; or
- (b) within sixty days after written notice is given by the employee organization, trade union or council of trade unions of desire to bargain to make or renew, with or without modifications, a collective agreement,

and the Board or the Tribunal, as the case requires, may terminate the bargaining rights of the employee organization, trade union or council of trade unions bound by a collective agreement in respect of employees employed in the undertaking or that has given notice, as the case may be, if in the opinion of the Board or the Tribunal the transferee of the undertaking has changed the character of the undertaking so that it is substantially different from the undertaking as it was carried on immediately before the transfer.

5.-(1) Notwithstanding section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees employed in any of the undertakings applies to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal, as the case requires,

- (a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;
- (b) may determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of each such bargaining unit; and
- (d) may amend, to such extent as the Board or the Tribunal considers necessary,
 - (i) any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the undertakings, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings.

(2) Where an employee organization, trade union or council of trade unions is declared to be a bargaining agent under subsection (1) and it is not already bound by a collective agreement with the successor employer in respect of employees employed in the undertaking that was transferred, the employee organization, trade union or council of trade unions is entitled to give to the successor employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement.

6. Each of the contracts under review involves the Ministry of Correctional Services, and the inmates of a provincial correctional institution. The *Ministry of Correctional Services Act* provides, in part:

3. The Minister is responsible for the administration of this Act and any Acts that are assigned to him by the Legislature or by the Lieutenant Governor in Council.

4. It is the function of the Ministry to supervise the detention and release of inmates, parolees and probationers and to create for such persons a social environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford an inmate, parolee or probationer the opportunity for successful personal and social adjustment in the community, and, without limiting the generality of the foregoing, the objects of the Ministry are to,

- (a) provide for the secure custody of persons awaiting trial or convicted of an offence;
- (b) establish, maintain and operate correctional institutions;
- (c) provide programs and facilities designed to assist in the rehabilitation of inmates;
- (d) establish and operate a system of parole;
- (e) provide probation services; and
- (f) provide programs for the prevention of crime.

8.-(2) The Minister, for and in the name of the Crown, may enter into any contract or agreement that he considers advisable for the purpose of carrying out the provisions of this Act.

(3) The employees of the Ministry under the direction of the Minister or the Deputy Minister may enter into contracts or agreements for and in the name of the Crown to carry out the responsibilities of the Ministry under this Act.

7. We should note that the issue before us is whether there has been a “transfer” of “part” of the Crown’s “undertaking” within the meaning of the *Crown Transfers Act*, which extends OPSEU’s bargaining rights to the employees of the respondent community organizations. If there has been, we must then define the nature and extent of those bargaining rights in the new organizational setting. There is no allegation that the employees of the respondents are “Crown employees”, or that the nature of the economic relationship makes the respondents “Crown agents” while they are performing their obligations under the contract (i.e. that the OPSEU agreement applies because these workers are really employees of the Crown or a Crown agency).

8. It will be convenient to consider each of the contracts separately.

* * *

The BIFA Contract

9. The Black Inmates and Friends Assembly began in 1975 as a non-profit organization created and operated by inmates within Milhaven Penitentiary. Its primary purpose was, and remains, to address the special needs of the black inmate community.

10. Throughout the 1970’s BIFA spread to a number of other federal institutions. Each prison created its own organization separately chartered by BIFA and run by the inmates themselves. The various chapters address local concerns within the framework of the organization’s general objectives.

11. Over the years BIFA has formed strategic alliances with other black community organizations such as the United African Improvement Association and the Jamaican Canadian Association. These groups have educational, cultural and advocacy functions which complement those of BIFA. BIFA has also forged links with black business organizations. Since 1985 BIFA has been an independent group.

12. The cultural and housing services provided by BIFA are delivered through volunteer members and part-time workers. Apparently, there is only a limited number of people who are able to provide these services effectively, and BIFA is believed to be the only group allowed to use the same personnel in various federal penal institutions. However, BIFA's activities are much broader than those undertaken in federal prisons, and include black community initiatives, community organization, and advocacy.

13. Nevertheless, the major focus of BIFA's organization, and seventy-five per cent of its efforts, are directed to the operation of programs for federal institutions in respect of federal inmates (who, however, may be incarcerated from time to time in provincial jails). BIFA's work for MCS at the Metro East Detention Centre comprises a small proportion of its total activities, and a small proportion of its actual funding. However, the "work" that BIFA does for MCS cannot be easily measured in economic terms, because the "volunteer" component overlaps with activities that are subsidized in various ways. It is this flavour of "subsidy" rather than "fee for service" which makes it so difficult to analyze BIFA's activities.

14. What has happened over the years is that services initially organized on a self-help or volunteer basis came to be recognized as a valuable adjunct to institutional programs, and therefore began to be subsidized or formally "contracted". But as Beverly Folkes, BIFA's Executive Director explained, the work components cannot be easily separated, nor does BIFA try to do so; and that makes it difficult to establish how many hours BIFA workers actually devote to provincial inmates. The contract is not an unfailing guide, and, of course, no-one complains if BIFA workers spend more hours than those specified in the contract. Ms. Folkes described the extra functions and the volunteer time as a "bonus", and pointed out that BIFA would be working in penal institutions regardless of the contracts with MCS. Similarly, although the contract with MCS refers to "discharge planning", that is a fairly elastic term, which in Ms. Folkes' opinion, covered almost any contribution to the pre-release rehabilitation process, and almost any kind of assistance that might facilitate the inmate's return to the community. Again, whatever purpose the contract definition may serve, no one worries much about it in practice.

15. An additional complication is that BIFA workers at the Metro East Detention Centre also make contact with "federal" inmates who may be temporarily incarcerated there (for a parole violation, for example) and may be dealt with pursuant to BIFA's contractual arrangements with the Federal Government. BIFA workers may be in an institution for reasons other than the MCS contract, and, in fact, it was its federal activities which initially drew the organization to the attention of MCS.

16. It is also difficult to divorce the counselling done inside the prison from the networking, follow-up and liaison done by BIFA in the community on behalf of black inmates. Indeed, it is the ability of BIFA to make these connections and build these bridges to the community which contribute to its effectiveness, and distinguish its functions from in-house counselling or rehabilitation programs which terminate upon the inmates' release. Ms. Folkes found it hard to specify how many of the hours mentioned in the MCS contract were spent inside the jail and how many were devoted to outside activities.

17. For present purposes, therefore, we should note that if OPSEU's bargaining rights and

collective agreement are restricted to the "work" done by BIFA workers pursuant to BIFA's contract with MCS, such workers would be constantly moving in and out of the OPSEU unit/agreement, depending upon whom s/he was seeing or what s/he was doing from time to time. The problem would be exacerbated if "volunteer" work had to be distinguished from work hours specified in the contract.

18. We will return to this practical problem later.

19. Ms. Folkes described BIFA's role as that of an intermediary or mediator between the inmate and the custodial caregiver. BIFA is a culturally-sensitive "go between", which helps the inmates cope with the prison environment and helps the custodians understand the special needs of these prisoners. According to Ms. Folkes, BIFA workers have knowledge and sensitivity which the MCS employees lack, so that BIFA may be able to identify irritants or rehabilitative opportunities which would not be apparent to a white correctional officer. Ms. Folkes gave such examples as: the special diet required for a Rastafarian; the newspapers, community bulletins or newsletters which might be of interest to black inmates; the range of communication problems associated with West Indian dialects; and an appreciation of more subtle, culturally-influenced forms of social behaviour. As an example, she mentioned the way black men in the West Indies are conditioned to react to authority figures. They avert their eyes, which, to them, is intended to accord deference, but to a white observer, might be considered "shifty".

20. It is common ground that the goals of MCS and BIFA overlap, and that both organizations hope to bring about rehabilitation, positive personal change, and successful reintegration into the community. In Ms. Folkes' submission, those goals can best be accomplished by understanding the needs of black inmates, and by building positive connections with the black community and its institutions.

* * *

21. In or about February 1987 BIFA submitted a formal proposal to the MCS for the provision of cultural liaison, discharge planning, and post-release services, for black inmates at the Metro East Detention Centre. By this time, of course, BIFA had an established expertise and presence, not only in the black community, but in a number of penal institutions as well. BIFA's proposal was accepted as a pilot project, from November 1987 to March 1988, involving eight hours' service per week. Both parties were satisfied with the result, and subsequent contracts were concluded, increasing the number of hours per week from twelve in 1988 to sixteen in 1989.

22. The services provided by BIFA include "culturally-sensitive" discharge planning for members of the black and Caribbean inmate communities. This involves counselling, assessments and referrals in respect of accommodation, education (academic and vocational), employment, finances, personal life, substance abuse, and other areas deemed appropriate by the inmate, the institution or BIFA. In addition, BIFA provides assistance to inmates *after* their discharge from the institution. BIFA also provides assistance to families of inmates, both while the inmates are at the institution and after their discharge. Some of these functions could not be performed by MCS employees, whose focus is the inmate, not his family, and whose role is limited to the inmate's time in jail.

23. Much of the assistance provided by BIFA to the inmates or their families is from within the black community. This is facilitated by networks already established by BIFA. BIFA has also assumed an advocacy role for individuals who are or have been incarcerated. This includes obtaining assistance from government agencies and making representations on behalf of those individuals to embassies and tribunals.

24. As part of its discharge planning function, BIFA holds weekly seminars to provide assistance to inmates within the Metro East Detention Centre. These seminars identify and explain issues of ethnicity, race and culture so that inmates may make a smoother transition into society upon their release. BIFA also assists the MCS in the development and administration of its programs. This too can involve BIFA in an advocacy role, making representations to the government regarding the needs of the black and Caribbean community.

25. BIFA's activities are reflected in the terms of its most recent contract with MCS. That contract includes these provisions:

Article 2:00 - Agency's Covenants

2:01 The Agency shall provide the Ministry with discharge planning services during the currency of this Agreement. It is understood that such services shall be of a quality acceptable to the Ministry and be in accordance with the requirements of Schedule A to this Agreement.

2:02 It is understood that the Agency shall provide services to both clients within the Metro Toronto East Detention Centre and within the community.

2:03 The Agency agrees to accept all clients of Caribbean origin referred by the Ministry for discharge planning services.

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2:08 The Agency Acknowledges that this Agreement is a contract for the purchase of services and is not meant or intended to create an employer-employee relationship.

2:09 For the purpose of this Agreement the Agency will liaise with institutional staff as designated by the Social Program Administrator.

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2:11 The Agency will provide Discharge Planning Services for selected Black inmates in the area of accommodation, employment, substance abuse, marital counselling, schooling/skills, training, financial assistance, psychiatric assistance and other areas as specified by the institution.

2:12 The Agency may utilize volunteers to carry out some portion of the service such as intake information, community liaison and other services as agreed upon by the Ministry.

2:13 The Agency may "contract out" some portion of the service, such as intake, community liaison, and other services as agreed upon by the Ministry.

* * *

Article 14:00 - Not Exclusive

14:01 The Ministry has the right to grant rights privileges of the same or of a similar nature as the pres[ent] Agreement to any person, firm, corporation, or agency with restriction whatsoever.

Schedule A referred to in Article 2:01 reads as follows:

SCHEDULE A

DISCHARGE PLANNING

The Agency will provide programme consultation in the form of discharge planning services to the Metro Toronto East Detention Centre and it will be responsible for implementing, evaluat-

ing and monitoring a discharge planning programme that will be made available to inmates from the West Indian or Black community.

The Agency will be responsible for seeking out all inmates eligible for or in need of discharge planning assistance. Referrals may be made to the Discharge Planning Co-ordinator by the Metro Toronto East Detention Centre staff and by the community i.e. spouses, probation and parole, etc., or the inmates themselves.

The Agency also will be responsible for designing and operating special need programmes for West Indian/Black inmates in order to assist them in their re-integration to the community. Professionals and other members from the community with expertise in the area of Discharge Planning will be recruited by the Agency as non-paid volunteers to assist with Discharge Planning for these inmates.

The Agency will assist inmates on a one to one basis through assessments and referrals by providing them with Discharge Planning Services in the areas of accommodation, employment, substance abuse treatment programmes, education, vocational assessment, training and counselling, financial assistance, personal counselling, and any other areas deemed appropriate by the institution and the Agency.

This description is quite flexible, and, in practice BIFA does whatever it considers useful to help inmates cope with the prison environment or facilitate their successful return to the community.

26. As the contract provides, BIFA may use either volunteers or employees for its functions in such combination as it considers appropriate; moreover, BIFA is empowered to "contract out" certain portions of its "work" [Article 2:03]. However, the contract itself cannot be assigned. BIFA provides periodic reports, insurance coverage, and undertakes to maintain confidentiality. The contracts are for a one-year term, terminable on notice, and the Ministry reserves the right to grant rights of the same or similar nature to others. If MCS wants to involve others in the kind of work BIFA is doing, MCS is free to do so; BIFA does not have the exclusive right to perform work of this kind.

27. It is difficult to determine how many hours are spent by BIFA workers inside the institution and how many hours are spent outside, doing follow-up work, establishing contacts in the community, and so on. Ms. Folkes estimated that 40% of BIFA's work is done on the inside and 60% is in the community - but these are only estimates. There will be considerable variability from week to week, depending upon the number of BIFA workers involved and the other demands on their time. The BIFA workers come and go as the needs require and their time permits. They do not have a fixed agenda, except as is necessary to facilitate their entry and exit from a secure facility.

28. As we have already mentioned, one of the strengths of the arrangement - and an important difference from what MCS officers do - is that BIFA can make contact in the institution *and* provide continued service when the inmate is released back into the community. BIFA is able to draw upon resources and assist inmates in ways which are simply not open to MCS employees. From an inmate's perspective, BIFA is not part of "the system", but rather has its own independent roots in the black community, and is a self-help organization for inmates themselves. Ms. Folkes and her workers do not have formal social work or academic credentials; however, they are able to approach inmates in a non-threatening way, engender trust, and engage in mediation and "counselling" in ways which may not be open to institutional professionals. At the very least, there is something to be said for experience "in the trenches", garnered from the inmate's point of view.

29. The BIFA contract (as augmented by whatever voluntary activities are involved) is the only bundle of services specifically targeted to the needs of black inmates. No similar "program"

for black inmates has ever been provided by MCS at the Metro East Detention Centre, or elsewhere. In this respect, the BIFA arrangement is unique.

30. On the other hand, the BIFA agreement is not the only institutional recognition that inmates have needs specific to their particular language, culture or environment. English as a second language programs address the deficiencies of inmates from foreign language groups. There is a special "Francophone unit" attached to the Ottawa-Carleton Detention Centre, which is described in this agreed statement of fact:

FURTHER AGREED STATEMENT OF FACT

1. The Ministry of Correctional Services operates the Francophone Treatment Unit ("the Unit") at the Ottawa-Carleton Detention Centre. The Unit has been operating since March of 1990.

2. The Unit is a treatment unit designed to meet the needs of members of the Francophone inmate population in need of assistance with respect to alcohol and substance abuse. It offers services entirely in the French language and with a focus on the specific cultural and societal background of the francophone inmate.

3. The Unit is staffed by nine persons each of whom is an employee of the ministry. There are 5 Correctional Officers, a Psychologist, a Psychometrist, a Social Worker and a Nurse.

4. The Unit can house and serve up to 16 inmates or residents at one time. The Unit provides each resident with a three-month program.

5. The Unit is open to all inmates of a Francophone background across the province who have been sentenced and who are appropriately classified for the Unit. An inmate can come to the Unit at any point during his sentence. An inmate can either request admission to the program or be referred to it. Inmates must meet minimum security requirements. Thus medium, maximum and remand inmates are excluded from the program.

6. The Psychometrist operates a number of programs for the residents such as drug and alcohol counselling (individual and group). The Social worker conducts a mutual aid program which involves discussion with inmates which includes discussion of anger management, life-skills, family and domestic violence and discharge planning. Such discussion is not a treatment program. Each program is operated in French and designed to take into account issues particular to the francophone culture and background of the residents.

7. Discharge planning work with the residents is done by the social worker with assistance from the correctional officers. The Unit operates on a case management procedure with respect to discharge planning meaning that each resident begins a discharge planning program from the date they arrive in the Unit.

8. The discharge planning is done on a one to one basis and through groups. The precise nature of the planning offered varies from resident to resident and depends on the stage of sentence at which the resident enters the Unit.

9. When involved in discharge planning with a resident who is preparing for re-entry into society at the end of his stay in the Unit, Ministry staff will be involved in direct dealing with a variety of community agencies and services to prepare the resident for discharge. For example, staff will be in direct contact with halfway houses or group homes such as Maison Fraternite (a francophone only home), Serenity Renewal and a number of homes in Quebec in order to ensure that the resident will have housing upon his release. Ministry staff will also set up contact with agencies such as the John Howard Society or Catholic Family Services. In addition Ministry staff frequently have direct contact with Cite Collegial, a francophone community college, to make arrangements for continuing education for residents. Ministry staff will also contact employment services such as a Canada Employment Centre, Programme Avnir or the Futures Program and, very occasionally, will have direct contact with potential employers, identified by the inmate, to

assist the resident in finding employment upon discharge. Ministry staff will also have contact with a number of treatment programs to make arrangements for the resident to continue treatment begun in the Unit for alcohol and substance abuse. When the resident will be returning to a community at a distance from the Centre, the contacts will normally be made through an intervening agency or correctional institution.

10. Staff follow up on the progress of the resident after the resident has left the Unit, is often done through a written contract by which the resident agrees to adhere to certain particular conditions upon their discharge.

11. Follow up will occur in a number of ways. There is often follow up which does not directly involve the resident where there will be a meeting between the social worker and an agency, such as a group home or treatment program, to which most of these inmates are assigned, to advise the agency as to the program followed by the resident in the Unit and the resident's progress on such program and to establish or discuss the plan of action to follow such program.

12. While residents are at liberty to call the institution for advice, the Ministry has no jurisdiction over the inmates once they have left the institution. There will often be telephone contact between staff and the resident initiated by the resident when the resident confronts problems after his return to the community. Depending on the nature of the problem, the resident may be counselled as to how to attempt to resolve the problem on his own, or direct advice and assistance may be offered. The nature of the problems encountered ranges from the routine (how to obtain work boots needed for a particular job or bus tickets to get to an interview) to the quite serious (difficulties with relationships at home with a spouse where the spouse may be actively using alcohol or drugs).

13. Staff may also be alerted to problems by agencies (such as a halfway house) with whom the resident is now dealing. On rare occasions, where the nature of problems encountered so warrants, a direct meeting between staff and resident may be held. Such meetings are very occasional and are unstructured. On such occasions the meeting will involve the intermediary agency with whom the residents is now dealing.

14. Most inmates are sent from the francophone Unit to a halfway house called Decision House. Decision House has no drug and alcohol program. When an inmate is given a temporary absence pass to Decision House, the Ministry staff write as a condition of that privilege the program that they want the inmate to participate in. Decision House staff arrange for treatment programs from community agencies like the Royal Ottawa Hospital. The arrangements are made by non-Ministry staff. Ministry staff then receive a monthly report from the halfway house outlining the inmates participation in the said program(s). Thus, while there is follow-up, in most cases it occurs as described above while the inmate is still serving his sentence.

15. Any work involving family members at the institution occurs while the inmate is still incarcerated. Any follow-up at the halfway house is with staff of that facility and not with Ministry staff.

31. In addition, penal institutions in the North try to cope with the special circumstances of native inmates - although, of course, many of their problems (for example, substance abuse) are common for all inmates. According to Mr. Birks, the Chief of Social Work Services for the MCS, the local community organizations have been involved in some settings, and efforts have been made to recruit native employees who may be better able to relate to and address native needs. Thus, while there are no other contracts like the one with BIFA targeted for black inmates (at least none brought to the Board's attention), some MCS programs do have a cultural, ethnic or regional focus, some services have a cultural component, and other local community organizations have been drawn into the rehabilitative process.

The St. Leonard's Society Contract

32. The St. Leonard's Society of Metropolitan Toronto ("SLS") is a non-profit organization

providing half-way houses and counselling services to inmates of federal penitentiaries. SLS also provides some counselling services to inmates currently incarcerated within provincial institutions. Its objectives include this one:

“To follow Christian teaching by the assistance, education and rehabilitation of juvenile and adult offenders and other needy offenders and to promote their integration and establishment in society”.

33. Frank Sheward, the managing director of SLS, testified that the SLS’ approach to serving inmates grew out of its experience in half-way houses, which remain its principal focus. The counselling, employment assistance, life-style training, and so on, were ancillary services in support of the broader objective of changing the residents’ goals and maladaptive life-styles.

34. It was this experience with the half-way house residents that drew SLS into counselling activities. SLS workers were struck by the constant correlation between criminality and addiction, and that made SLS conclude that crime was itself a kind of “addiction” - a repetitive pattern of destructive behaviour which generated its own “high” or “psychological reward”, and thus was difficult for the ex-inmate to break. According to Mr. Sheward, this analysis of crime as an “addiction” makes the SLS approach unique. However, Mr. Sheward himself is no stranger to addiction counselling. He has worked for the Alcohol and Drug Addiction Research Foundation, the John Howard Society, and the Armed Services.

35. Like BIFA, the St. Leonard’s Society was drawn into a more formal contractual arrangement with MCS as a result of its volunteer work in federal and provincial prisons, and its involvement with post-release agencies. An SLS worker was regularly in the provincial jails to see federal parole violators, and over time other inmates asked to see her. She responded, and eventually the potential value of her work was recognized by MCS, which approached SLS to seek its assistance on a more formal basis.

36. SLS sees the “criminal addiction process” as a progressive one, drawing the offender into ever more serious and destructive behaviour, and moving him, inexorably, from provincial offences and institutions, into more serious crimes and federal incarceration. Since SLS was already heavily engaged in consultation in federal prisons, it welcomed the opportunity to move “downstream” into the provincial system where it was believed the prisoners originated, and where they might respond positively to early intervention. As in the case of BIFA, the objectives of SLS overlap with those of MCS.

37. The SLS program provided by its contract with MCS is a free-standing one - that is, it does not involve any systematic or regular liaison with other institutional counselling arrangements. There is no “interface” with correctional officers. There is a global report on the number of inmates seen, the number of sessions held, and the number of contact hours, but there is no sharing of its counselling role. Inmates approach SLS workers on the range, and indicate their desire for assistance with their substance abuse problems. According to Mr. Sheward, referrals come by word of mouth or inmate initiative. There was no routine referral from MCS employees - although SLS workers would not be in a position to know if the inmates were responding to recommendations made to them by MCS employees.

38. The SLS program is strictly voluntary and its focus is solely on *personal recovery*. SLS provides no referral letters, or recommendations upon which the inmate may rely in court or for institutional purposes. As Mr. Sheward put it: the objective is recovery, not earning “brownie points”; and if SLS began to offer reference letters, inmates would enrol for the wrong reasons.

39. On the other hand, SLS' general objectives are consistent with those of MCS: recovery from alcohol, drug or criminal addictions; rehabilitation; positive personal change; and reintegration into society. Like BIFA - but unlike MCS - SLS is able to follow its "clients" into the community, through its own half-way houses and its own network of contacts. As in the case of BIFA, MCS provides only a small proportion of SLS' overall funding/revenue, with the bulk of its funds and activities linked to the Federal Government. And, like BIFA, its services are available to both federal and provincial inmates, without rigid analysis of contract hours.

40. SLS has eight or nine employees, all of whom have formal training in social work, certification in addiction counselling or comparable experience in the field. None of this expertise was derived from MCS; and, in fact, it was MCS' recognition of this pool of experience and a possible fresh approach which prompted MCS to formalize the contractual arrangements. The relationship evolved from one in which SLS provided a bundle of services on a voluntary basis, to one in which SLS provided the same kind of service, but received a subsidy. There was no basic change in the character of the work once it became subsidized. While in the provincial jails, the SLS workers perform a variety of functions, some of which are associated with the MCS contract, some of which are associated with federal contracts, and some of which remain volunteer work. There is no rigid separation or compartmentalization of these functions.

41. Susan Bouchard was the only SLS employee involved with the contract with MCS. Ms. Bouchard has a Bachelor's Degree in Social Work, is a certified addiction counsellor, and has about twelve years' experience in the field. She divided her time between the half-way house and the detention centre, with about sixty per cent of her effort devoted to activities at the house and forty per cent involved with the sixteen hours (and ancillary volunteer work) specified in the contract. Apparently, SLS subsequently concluded another contract with a further sixteen-month component so that Ms. Bouchard began to spend thirty-two hours in connection with those contracts, at different institutions, and about eight hours in the half-way house.

42. SLS is not involved in "Discharge Planning" as such. It is engaged in a specific program involving drug and alcohol rehabilitation which (it is said) has a novel perspective or approach. But, to the extent that a successful transition into the community involves recovery from these addictions, or establishing connections with outside help from other organizations (such as AA), the goals of SLS are consistent with those of MCS and coping with addictions will be an element of any discharge plan. However, SLS (unlike MCS) can be involved in the *execution* of the plan, and the follow-up of inmates in the community in a way that MCS employees cannot.

43. As of the completion of the hearings, SLS had no one working in the provincial jails. There was still a contract with MCS but SLS was looking for an employee to add to its staff to do that work (among other things).

The Contract with Community Liaison Services

44. The organization known as "Community Liaison Services" did not participate in the hearing. The evidence concerning its activity is derived from the terms of its contract with MCS and the testimony of Don Michael, an MCS official.

45. Discharge planning is a function performed across the corrections system, because, eventually, all inmates are released and MCS is obliged to do what it can to facilitate their re-entry into the community. These planning functions are performed by social workers and rehabilitation officers, who can organize referrals and may make contact with agencies in the community (e.g., John Howard Society) that can provide direct help, in areas such as accommodation, employment, or addiction counselling. However, the MCS employees do not follow the inmate into the commu-

nity, nor does MCS have the same kind of community roots that an organization like BIFA, SLS, or CLS would have. The MCS employees are not involved in post-release services; moreover, because the inmate may be leaving a particular institution for an entirely different community, there are real limitations to the amount of direct liaison an MCS employee can do. We were told that they do not make appointments because ex-inmates often fail to follow through, so the discharge “plan” may in fact be limited to providing a list of community contacts, with the initiative remaining with the ex-inmate. According to Mr. Michael, client service can be better provided by community agencies with a base in the area where the ex-inmate expects to live. They can get to know the client while he is in the institution, then work with him, post-release, to help resolve any problems he might encounter.

46. The contract with Community Liaison Services was described as a “facilitator agreement” involving Shirley Ferguson and a group of part-time workers, student placements and volunteers whom Ms. Ferguson assembles and supervises. Ms. Ferguson lives in the Scarborough community and has developed a network of contacts with various local agencies. Exhibit 19 lists the “community resources” with which Ms. Ferguson maintains contact. Areas include: housing, employment, education, addiction, counselling (personal, family, culturally-specific), life-styles, clothing, applications (government bureaucracies) and miscellaneous (Revenue Canada, family benefits, John Howard Society, Salvation Army, External Affairs - Passport Office, etc.). After each general heading, there is a list of resources as diverse as welding schools, adult training programs, learning centres, centres for Spanish-speaking persons, the Anishnabbe Health Centre and “Cocaine Anonymous”. Ms. Ferguson and her group are intermediaries. Their participation in the development of a discharge plan is linked to their execution of that plan post-release, and that involves channelling the client into the community programs that are available and appropriate.

47. The agreement with Community Liaison Services contains these provisions:

Article 2:00 - Facilitator's Covenants

2:01 The Facilitator shall provide the Ministry with programme consultation and discharge planning services during the currency of this Agreement. It is understood that such services shall be of a quality acceptable to the Ministry and be in accordance with the requirements of Schedules A-1 and A-2 to this Agreement.

• • •

2:04 The Facilitator shall provide discharge planning services both within the Metro Toronto East Detention Centre and in the community.

• • •

2:06 For the purposes of this Agreement, the Facilitator will liaise with institutional staff as designated by the Social Programs Administrator.

2:07 The Facilitator shall provide a maximum of thirty-five hours (35) discharge planning service per week.

• • •

2:11 The Facilitator will provide Discharge Planning for selected inmates in the areas of accommodation, employment institutional behaviour for parole purposes, substance abuse, marital counselling, schooling/skills training, financial assistance, psychiatric assistance and other areas as specified by the Ministry.

2:12 The Facilitator may utilize volunteers to carry out some portion of the service such as intake information, community liaison and other services as agreed upon by the Ministry.

2:13 The Facilitator may "contract out" some portion of the service, such as intake, community liaison, and other services as agreed upon by the Ministry.

Article 11:00 - Not Exclusive

11:01 The Ministry has the right to grant rights and privileges of the same or of a similar nature as the present Agreement to any person, firm, agency, partnership, or corporation without restriction whatsoever.

Schedule A to the contract is a proposal from Ms. Ferguson which has been incorporated by reference:

PROPOSAL

METHODOLOGY

Interview inmates prior to release to determine need for assistance in formulating post release plans.

• • •

EDUCATION

- Local school boards
- Alternative schools
- Community Colleges
- Ministry of Colleges and Universities.

SELF HELP GROUPS

- Alcoholics Anonymous
- Narcotics Anonymous
- Ex offenders Anonymous
- Gay community Centre.

As in the case of BIFA and SLS, the contract with Community Liaison Services contemplates confidentiality, requires insurance and involves the limited use of MCS facilities.

48. The fee prescribed in the contract is \$65,000.00 which Ms. Ferguson is to allocate among herself, her fellow workers, and the costs of providing the prescribed services. The estimated budget attached to the contract indicates that eighty-five per cent of the funds are expended on salaries and benefits for the program coordinator, three intake workers, and a resource worker (five workers in all).

General Information

49. Apart from the specific contracts under review, the witnesses provided the Board with some general information about MCS programs and practices. In reviewing and summarizing this evidence, we have tried to avoid the labels which the witnesses placed on particular activities, or the "social work jargon" that occasionally surfaced. We do not think that these labels are particularly helpful in resolving the issues that we must decide.

50. From the time an inmate enters an institution until his eventual release, there is regular contact with MCS employees for the purpose of assessment and referral to appropriate people or programs that may be of assistance to his rehabilitation. This kind of communication takes a variety of forms and will try to focus on the particular inmate's needs and problems. Counselling may touch on personal problems at home, emotional or psychological difficulties, addiction to various

substances (more often than not in combination with one another), or anything else that may have contributed to the inmate's inappropriate behaviour or might discourage its repetition. All of these "programs" - be they social, recreational, educational, self-help or therapeutic - fall within the general umbrella of the goals listed in section 1 of the *Ministry of Correctional Services Act* (*supra*).

51. Some of the correctional officers, social workers or other "helping" professionals use "models" or techniques of which they may be advocates. They are adherents to particular "schools" which they claim are superior in analytical power or operational effectiveness. Other officers are more eclectic in their approach. However, according to Randy Scott, the Acting Chief of Social Work at the Guelph Correctional Centre (and an OPSEU witness), the "hands-on counselling is pretty much the same regardless of where you start".

52. It is recognized that inmates are incarcerated because of inappropriate and illegal behaviour, and that rehabilitation ultimately involves personal changes which make a recurrence less likely. Since inmates are only in custody for a limited period of time, a key objective of all of these approaches is to motivate the client so that he will pursue "treatment" after his release. For example, recovery from an addiction requires continuous efforts which must be maintained after the inmate leaves the institution or conditions may develop which will bring him back.

53. According to Mr. Scott, who was a discharge planner for about a year, discharge planning, as such, does not involve "counselling" - merely the provision of information. But it is not clear where one ends and the other begins, since, presumably, the information involves options and one of the functions of a discharge planner is to set out and encourage sensible choices. Be that as it may, Mr. Scott distinguished "counselling" from "discharge planning", and he maintained that parole officers don't do much counselling either. They are too preoccupied with monitoring the inmate's compliance with his conditions of release.

54. All of the witnesses described in-house MCS programs provided by MCS employees which (to an outsider at least) seem similar to those provided by the subcontractors. We have already mentioned the services tailored by MCS to meet the needs of Francophone or native inmates. They resemble the efforts of BIFA to meet the needs of black inmates. In addition, MCS social workers or correction officers are involved in alcohol/drug counselling, which resembles - in goals and techniques if not in perspective or "model" - the activities of SLS. There are also programs concerning literacy, life-skills, vocational training and so on. The key difference is that the subcontractors are linked to the community, can follow the inmate there, and can provide continuing assistance, while the MCS employees do not. The MCS employees are prohibited from any contact with the inmate after his release, and, on the evidence before us, the probation-parole officers do not perform functions of this kind. This restriction is a matter of MCS policy.

55. It is evident from the evidence before us that, quite apart from the particular subcontracts with which we are here concerned, subcontracting is widely used by MCS to supplement the services provided by its own employees, or meet the needs of particular inmate groups. The involvement of outside organizations allows MCS to tap experience and expertise not readily available within its own employee complement, or which cannot be accessed because existing MCS employees have other priorities. Mr. Michael testified that in some cases his staff are just too busy with their own work, and if the needs of inmates are to be met, subcontractors must be engaged. In other cases, the subcontractor provides a different perspective, expertise, or an outsider's view of things.

56. Subcontracts allow for experimentation, the testing of new rehabilitation models, or the evaluation of techniques developed outside MCS itself which may later be adapted for use within the organization. It permits access to acknowledged experts in the field, or professionals who

would not be interested in government service, but whose talent can be tapped on a part-time or periodic basis. As Randy Scott put it: "It gives us flexibility ... we could not hire their expertise". For example, Mr. Scott testified that a professional social worker attached to a Hamilton hospital conducts an "anger group" which was very similar to one conducted by an MCS psychologist. In that case there is not much doubt that "the work" is pretty much the same.

57. Mr. Scott testified that experienced professionals like the one from Hamilton provide valuable adjunct services that would not otherwise have been available to the rehabilitation team on a longer term basis. Money can sometimes be found for "contract" work of this kind which is not available to hire more civil servants, and sometimes workers are available on this basis who have little interest in employment in the civil service. And sometimes, the particular institution simply does not have that component on staff, or its staff are too busy doing other things.

58. It should be noted, therefore, that the motive for the subcontracts is not necessarily economic or to obtain services more cheaply, but may reflect a desire to engage different people and different perspectives - albeit to do "work" which is generically similar or directed to established MCS goals. Mr. Michael testified that even if the "salary dollars" were available (which they are not these days), MCS could not replicate the services rendered by these professionals or community-based agencies. In his submission, there is an independent value to drawing community groups like BIFA or the St. Leonard's Society into the rehabilitative process because they represent the community to which the inmate is returning and can provide service which MCS cannot - in part because they are not regarded as part of "the system".

59. To illustrate the wide variety of subcontracting arrangements which arise in other areas, we might note that the MCS chaplaincy program involves a clergyman who is a civil servant employed by MCS, but, in addition, there are clergymen drawn from outside organizations who are engaged and provide pastoral services on a contract basis. In one sense, the "work" is the same - a clergyman is a clergyman and pastoral services all have a religious focus. But from the communicant's point of view, the work of a priest is different from that of a rabbi, and the work of one cannot substitute for the other. And, as anyone who has encountered an exemplary "teacher" or "counsellor" will know, that label does not describe the process, and there are vast differences in approach or success.

60. When one closely examines the facts, it becomes much more difficult to place them in the neat pigeon holes envisaged by the formula OPSEU urges upon us. That formula sounds simple enough. The Crown performs various kinds of "work". The performance of that "work" is a function of the Crown. If the opportunity to do "that work" is transferred to another employer, the OPSEU bargaining rights follow and attach to the employees who do the "work". To determine what "the work" belonging to OPSEU is (i.e. the function which forms "part" of the Crown's "undertaking"), one must merely look to see whether civil servants somewhere are doing "work" of that kind: tree planting, salting roads, and so on. If so, then the performance of that work by anyone else constitutes the acquisition of a Crown function (defined as "work" similar to that which Crown employees do) which constitutes part of the Crown's "undertaking" for the purposes of the *Crown Transfers Act*.

61. But in trying to state the evidence fairly, these simple categories break down, making it difficult to use language that does not embody a legal conclusion. From OPSEU's perspective, "counselling is counselling" and "discharge planning is discharge planning", whether it is done by a social worker or a culturally-sensitive, experienced amateur. Mr. Michael can honestly say that "discharge planning", as such, wasn't done at the Metro East Detention Centre prior to the subcontracts, and BIFA's role is unique, but discharge planning was done elsewhere and the label

begs the question of what “discharge planning” is. If it involves assessing inmate needs or problems, outlining post-release options and counselling sensible choices, then a wide variety of MCS activities are devoted to these goals, whether or not MCS labels the process “discharge planning”. Similarly, even though what BIFA does is unique in some respects, it is not easy to differentiate these “Black” cultural initiatives from programs directed to Francophones or native persons. These programs have a distinct racial or cultural focus, just as the contract with BIFA does; and, in any case, it would demean the role of correctional officers to suggest that they ignore these inmate characteristics or do not incorporate a sensitivity to race and culture into their own rehabilitative approach. Whether they are able to do so as effectively as the outsiders can, is not for us to decide. The point is: it is difficult to distinguish what they do from what BIFA or SLS do inside the jails - although BIFA and SLS may have a different viewpoint or even be able to do “the work” better in some respects.

62. Just to round out the picture, we should reiterate that in provincial correctional institutions there is a whole host of volunteers providing counselling, discharge services, pastoral advice, substance abuse services (e.g., AA, NA, CA), help with future employment and accommodation, and so on. Some of these volunteers come from charitable organizations or agencies with a particular focus - like the Native Canadian Centre or the John Howard Society. These agencies may even receive funding from one government source or another, even though they have no specific contractual relationship with the MCS like the present respondents do. Their “good works” receive a social subsidy, and the individuals working for these transfer agencies either as volunteers or on salary perform “work” in provincial correctional institutions which is similar to that which civil servants do or could do, and might have to do if there was no one else to do it. These outsiders are doing this work (and are sometimes paid) even though there is no specific contract with the MCS, and if they receive some sort of subsidy from “government”, it does not have the same fee for service quality as the funds provided to the subcontractors here. As an illustration: BIFA has received funds from the Human Rights Commission and the Ministry of Culture & Recreation.

63. Accordingly, to the extent that the test for a “Crown Transfer” is whether there are workers doing work which is similar to that which civil servants do or could do, there are literally thousands of workers who meet that test. Anytime the Crown engages an outside organization (a law firm, for example) to do “work” which could be done by Crown employees, it can be said that the *Crown Transfers Act* applies to that organization and its employees, who would perforce be represented by OPSEU when doing that work.

* * *

64. Having outlined the facts, we now turn to the legal and policy considerations which affect our decision.

[Paragraphs 65 to 208 have been omitted, see Parnell Foods Limited, [1992] OLRB Rep. Dec. 1164 at paragraphs 61 to 204: Editor]

Decision

209. In each of the contracts under review, the respondent agency and its employees perform “work” or “functions” similar to those found within the undertaking managed by MCS; moreover, those functions are undertaken within the statutory framework governing the operations of MCS.

at an institution maintained by MCS, and under the over-riding control of MCS. The work is “different” to the extent that it may involve a different focus, different techniques, and different counsellors, whose approach may not be quite the same as MCS employees and who may have more freedom of action than MCS employees (in particular, the ability to develop contracts and do “follow-up” in the outside community). In BIFA’s case, it is “different” to the extent that the target group - black inmates - have characteristics which distinguish them from other inmates, the counselling agency shares those characteristics, and that may influence the way in which service is provided. Nevertheless, if the functional test were controlling, it would be difficult to say, for example, that the counselling done by BIFA workers was analytically different from that done by MCS employees, or that the addiction counselling done by the St. Leonard’s Society is materially different from that available elsewhere in MCS. No doubt the persons involved are different; but that does not change the nature of their “work” or the fact that the “functions” are generically similar, and similarly undertaken under the umbrella of *Ministry of Correctional Services Act*. In addition, the Crown closely controls the environment within which the functions are performed just as it does for its own employees, and in effect provides the “clients” who are the object of the respondents’ attention - although on the evidence before us it is the inmate who effectively chooses whether or not to avail himself of the agency’s services. But, in that regard, the situation may not be much different from the optional programs or opportunities provided by MCS’s own employees.

210. However, for the reasons outlined at length, we do not think that the “functional” approach is the correct, or determinative one. Rather, we think it is also appropriate to consider whether something tangible has been transferred from the Crown - equipment, know-how, employees, etc. - which permits the transferee to carry on the functions formerly done by the Crown: whether some portion of the Crown’s organization, operation or delivery system has been transferred to the respondents, thereby permitting them to carry out the functions prescribed in the contract. And, in the instant case, not only are the functions (or “work”) somewhat different, but the means to perform it resides entirely in the subcontractor’s own organization, and is not traceable to the Crown at all.

211. The subcontractor is using *its* own organization or “undertaking” to supply services to the specifications of the Crown; it has not acquired “part” of the Crown’s “undertaking” within the meaning of the *Crown Transfers Act*. This is not a case like *Beechgrove* where an institution was “privatized”, nor like *Regional Municipality of Waterloo* where an administrative unit, functions and a group of employees with accumulated skills was transferred to another organization covered by the *Labour Relations Act*. Here the identity of the work is debatable; the body of work is narrow, fragmented and discreet; it is unclear whether any Crown employee actually “lost” this particular work; no Crown employee was privatized; and the organizational abilities, skill, expertise, experience and know-how necessary to do the work already resided in the respondent agencies’ own undertakings which are operational independently of the Crown or these contracts. The independence of BIFA, for example, is underlined by the fact that it was performing similar functions on a volunteer basis, in prisons, with its own organization, before the particular subcontract which, it is said, constitute a Crown Transfer. BIFA does not derive its organization, undertaking, or employees, from the Crown or from anything that is traceable to the Crown.

212. In this context, it is very difficult to say that these agencies have acquired some severable portion of the Crown’s undertaking to which bargaining rights can meaningfully attach. What have they “acquired” other than access to the inmates (which BIFA and the St. Leonard’s Society had before) and money for the services they provide? There may be a fine line between providing a venue where services are performed and transferring a “part” of MCS’ “undertaking” to the control of someone else; however, the respondents in this case do not approach that line. The fact that

employees may do work in or for a Crown undertaking does not mean that their employer has “acquired” “part” of that Crown undertaking within the meaning of the *Crown Transfers Act*. A non-exclusive right to counsel inmates is no more a “part” of the “undertaking” within the meaning of the *Crown Transfers Act* than the “right” to repair the plumbing. Both may contribute to the inmate’s welfare but neither, in itself, is a “part” of the Crown’s undertaking to which bargaining rights sensibly attach.

213. In the circumstances of this case (following the Supreme Court’s analysis in *Bibeault*) we are not persuaded that the right to perform particular services (but not exclusively) created by the subcontract is a “part” of the Crown’s “undertaking” to which bargaining rights attach or which, on execution of the contract, creates a successorship - anymore than would thousands of other contracts for goods and services which are used in conjunction with one program or another. The fact that Crown employees, somewhere, may perform similar work is not determinative if the entity providing the service to the Crown does not acquire the *means* to do so from the Crown. If the functions/work are accomplished with its own employees and organization (i.e. *its own undertaking*), there is no acquisition of *the Crown’s undertaking* and, therefore, no successorship. The situation might well be different if location was intrinsic to the employer’s organizational ability to deliver a service (rather than just the place employees worked), or if the employer acquired the use of some critical asset, or if counsellors found themselves “privatized” or left the Crown’s employ while continuing to perform the same functions. In those circumstances, “something” would be traceable to the Crown other than a bare right to do work to the Crown’s prescription, and it might be easier to say that the employer has “acquired” or taken over some pre-existing “part” of the Crown’s undertaking. But those are not the facts in these cases.

214. In each of the subcontracting arrangements under review, the respondents have relied exclusively upon their own undertakings which existed independently of the Crown (before and after the subject contracts) and which did not derive the means to perform the contracts from the Crown. In our view, there has been no “transfer” of “part” of the Crown’s “undertaking” to any of the respondents, and therefore no successorship or extension of OPSEU’s bargaining rights to the respondents’ employees.

215. For these reasons, these applications are dismissed, and it is unnecessary to consider how a bargaining unit might be defined under section 4 of the *Crown Transfers Act* or otherwise.

216. The Board notes that the application with respect to “Streetlink” was withdrawn.

DECISION OF BOARD MEMBER D.A. PATTERSON; January 14, 1993

1. I concur with the majority decision of the Board and offer this addendum to the decision. In light of 2 previous decisions of this Board, *KBM Forestry Consultants Inc.* and *Charmaine’s Janitorial Services* and expansion of the theory of the first 2 cases in a 3rd case called *Dunning Paving Limited*, I feel obligated to offer this addendum to this majority decision.

2. It is this Board Member’s position that the fate of each case which comes before this Board is determined by its particular facts. I offer this addendum because of the facts in this particular case and I make no judgement or comments on the previously mentioned cases.

3. I would however make the following observation about this case and labour relations realities underlying it.

4. If I felt there was a transfer of the undertaking by the Crown, then the applicant would succeed, but in this case I don’t believe there was a transfer of this “undertaking”. The work

OPSEU claims within their bargaining unit is work I believe they never did. As the majority decision succinctly puts the case, the service provided and contracted by the Ministry of Correctional Services or Crown does not interfere or take away from the “undertaking” of the Crown or the Ministry of Correctional Services. These agencies are providing a specialized service to inmates, whether it be of a cultural nature or ethnic or of substance abuse related programs. In this situation the end product is not a gadget made or a meal served but rather it is a service provided to quite frankly fill the void which Ministry of Correctional Services cannot or could not fill.

5. The success of these agencies and the service they provide is somewhat unique and totally voluntary. The inmate makes the crucial decision, whether to accept or solicit the assistance or guidance or rehabilitation work of these agencies. The same inmate is fully aware of the services provided by Ministry of correctional Services and the Crown, so actually the inmate has at his/her disposal the convenience of options of who to seek help or assistance from. It is not the same service or “work” provided by Crown employees.

6. I share the majority opinion on the question of the Crown and what it has granted its own employees in terms of rights under the *Crown Employees Collective Bargaining Act*. I agree the Crown did not intend by amending the Act to give its own employees more rights or freedoms than is presently enjoyed by the private and public sector employees. As a matter of fact, the Crown has restricted its own employees in many areas which would appear unfair to those of us not in the Civil Service, but the Crown has that leeway because it is the arm of the government and carries out the government’s wishes.

7. I should also raise the question of similar issues heard and decided in other jurisdictions such as our sister Board, the Ontario Public Service Labour Relations Tribunal, the Canada Labour Relations Board and other Boards of Labour across Canada. The majority decision mentions a number of cases which have held that bargaining rights attach only to a work function. The consequences of that approach were difficult to sort out from a labour relations point of view, but, in any case, the Supreme Court ruled in the *Bibeault* case that bargaining rights did not attach to work. In page 63 I quote the court:

“Each undertaking consists of a series of different components which together constitute an operational entity. It goes without saying that one of these components is the work done in the undertaking is also determined by its particular physical, intellectual, human, technical and legal components....”

However, the court found that work, by itself, was not a “part” of an undertaking which, if transferred, creates successor rights. The *Bibeault* case came out of Quebec, however, in Ontario similar cases have been decided in a similar way to this Board.

2458-92-R Employees of 598142 Ontario Limited carrying on business as **Spooners' Restaurant**, Applicant v. The Retail, Wholesale and Department Store Union, Local 448, Respondent v. 598142 Ontario Limited c.o.b. as Spooners' Restaurant, Intervener

Representation Vote - Termination - Whether representation vote should be ordered (and ballot box sealed) pending resolution of issue of timeliness of termination application - Board questioning jurisdiction to order vote in circumstances where timeliness of application undetermined - Board adopting practice in certification procedure (to resolve entitlement issues before directing a vote) and declining to order vote until timeliness issue resolved

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. H. Wightman* and *J. Redshaw*.

APPEARANCES: *Paul Brooks*, *Patricia Wood* and *Pam Gibson* for the applicant; *Robert McKay* for the respondent; *Frank A. Angeletti*, *Jim Raglan* and *Joe Kiefer* for the intervener.

DECISION OF THE BOARD; January 7, 1993

1. This is an application for a declaration that the respondent trade union (the "union") no longer represents the employees of the intervener employer (the "employer") in the bargaining unit described below. The application is brought pursuant to section 58 of the *Labour Relations Act*.

2. Through the waiver process and the involvement of a Labour Relations Officer the parties were able to agree, prior to the hearing, that the bargaining unit affected by this application consists of:

all employees of 598142 Ontario Limited c.o.b. as Spooners' Restaurant at London, Ontario, save and except Department Managers and persons above the rank of Department Manager, office and clerical staff.

The waiver process also disclosed that there were 49 employees on the employer list for the purposes of the count. And although the union objected to the inclusion of three of those persons on the list of employees, it was also evident that, regardless of the disposition of those challenges, the statements of desire (petitions) filed in support of this application were numerically relevant. It is consequently not necessary for us to deal with those challenges, at least not at this stage of the proceedings.

4. This application was filed with the Board on November 16, 1992. In its reply to the application the union indicated as follows:

The parties held several bargaining meetings in 1992, the last occurring on September 14, 1992 with a mediator. The union accepted an offer put forth by the employer as settlement of all outstanding issues. The employer subsequently withdrew their offer. The Union has charged the employer with bad faith bargaining and a hearing is set for December 14, 1992.

5. At the commencement of the hearing, on December 18, 1992, in the present matter, the union advised that it was asserting the current application is untimely. According to the union a collective agreement was concluded in September of this year. If that is the case, the current application would clearly appear to be untimely. The employer denies the union's assertion regarding the current existence of a collective agreement. The parties agree, however, that these, or at least related issues are the subject of an unfair labour practice complaint, Board File No. 1876-92-U, in

which a hearing has already commenced and is scheduled to continue and likely conclude before a different panel of the Board in February, 1993. The union advised that in those proceedings it is seeking a direction that the employer execute a memorandum of settlement and that the Board declare that the collective agreement was in force from September of 1992.

6. None of the parties to the present application argued that this panel should hear all the evidence relevant to the timeliness issue at this stage of the proceedings. In view of the substantial overlap, if not complete identity, of the evidence that would consequently have to be heard by two different panels of the Board, we are of the view that the parties' position in this regard was eminently sensible. From there, however, the parties' views as to how we should proceed in this matter diverged. The union submitted that the present matter ought to be adjourned pending the determination of the Board in the unfair labour practice complaint at which time the timeliness issue would be clarified. The applicants and the employer urged the Board to proceed and hear the evidence regarding the voluntariness of the statements of desire (petitions) filed in support of the application.

7. After recessing to consider the submissions of the parties, the Board ruled, orally, that in the circumstances, including the fact that the union had not proposed adjourning the matter until the morning of the hearing and after the other two parties had been required to travel to Toronto from London and the fact that there was a real likelihood of completing the evidence in one day, we would proceed to hear the evidence regarding the voluntariness of the petitions.

8. We also noted at that time that once the section 91 complaint in Board File No. 1876-92-U was determined we would hear further from the parties with respect to the timeliness issue in the present application.

9. We then proceeded to hear the evidence of the applicants who called two witnesses to testify as to the origination, preparation and circulation of the petitions. After hearing this evidence and having the opportunity to cross-examine the witnesses, the union conceded that the petitions represented the voluntary desires those who had signed.

10. At this stage the parties once again disagreed as to how the Board should proceed. The applicants and the employer urged that the Board direct the taking of a representation vote and that, pending the determination of the section 91 complaint, the ballot box be sealed and the ballots not counted. The union argued that as long as the timeliness of the present application remained in doubt, no vote should be directed. As a practical matter, a determination as to the timeliness of the present application must await the determination of the Board in the section 91 complaint.

11. All of the parties advanced credible policy arguments to support their respective positions. For example, the applicants and the employer argued that any delay in holding the vote might have an impact on the composition of the voting constituency, they also asserted that to hold the vote and seal the ballot box would cause no prejudice to any of the parties. The union acknowledged that delay might have an impact on the voting constituency but argued that the Board should, for sound labour relations reasons, avoid even the possibility of holding a vote and then, in the event the application is found to be untimely, destroying the ballots and nullifying the vote.

12. The Board has further concerns about the propriety of directing a representation vote at this stage in the proceedings, which it raised with the parties at the hearing.

13. Section 58(2)(a) of the Act provides:

58.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

14. The union's position is that the collective agreement it asserts was in existence at the time of the application is a bar to these proceedings. The other parties dispute the existence of a collective agreement at the relevant time. Final determination of that issue will have to await the determination of the Board in the section 91 complaint. Hence, at least for the interim, the Board is unable to make an unequivocal finding regarding the timeliness of the current application. It may (or not) be that the applicants have no right to bring the present application. If the applicants have no right to bring the application then the Board has no jurisdiction to direct the taking of a representation vote.

15. Even if we were persuaded that we had some discretion to, at this stage, direct the taking of a representation vote in the unique circumstances of the present case, we are not satisfied such discretion should be exercised. In this regard we note that there are procedures under the Act where the Board does routinely direct the taking of representation votes while issues (some of which may ultimately go to the applicant's entitlement to a representation vote) are still outstanding and even before a hearing is held into those issues. There is, however, no equivalent for termination applications of the pre-hearing certification vote procedures found in section 9 of the Act. The obvious analogy to termination applications are the "regular" certification application procedures. It has not hitherto been the practice of the Board to direct the taking of a representation vote when the applicant union's entitlement to such a vote remains in dispute. Rather the parties generally must resolve any outstanding issues affecting the applicant's entitlement to a vote and then, if that entitlement is established, a vote will be directed. We are not persuaded that we should proceed any differently in the current termination application.

16. Further, it is not unreasonable to conclude that employees in the present case may wish to know whether they have a collective agreement (and even what its terms may be) before they are called on to exercise their franchise. We are also concerned about the impact on employee expectations and other potentially disruptive labour relations effects of holding and possibly subsequently nullifying a representation vote.

17. In all of these circumstances our concerns about holding a vote now outweigh the advantages of so doing. Thus, even assuming we have a discretion to direct the taking of a representation vote at this stage of proceedings, we decline to do so.

18. This matter is hereby adjourned pending determination of the complaint in Board File 1876-92-U. Once that matter is determined the union will have 15 working days from the date of that determination to advise the Board of its position regarding the timeliness of the present application. If the union (at any time) concedes the timeliness of the current application or fails to advise the Board of its position within the time stipulated, the Board may direct the taking of a representation vote.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN; January 7, 1993

I concur with the decision on the grounds that the Board may not have discretionary authority to order a vote in these circumstances. I am unaware, however, as to any "sound labour relations reason" for subordinating the prospect of the matter being voted upon by a totally different group of

constituents to the prospect of having to destroy uncounted ballots and nullifying a vote as mentioned at paragraph 11 of the majority decision.

COURT PROCEEDINGS

2526-89-G (Court File No. 210/92) Ellis-Don Limited, Applicant v. The Ontario Labour Relations Board and International Brotherhood of Electrical Workers, Local 894, Respondents

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Single judge of Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents - Board bringing motion before panel of Divisional Court to set aside order of single judge - At opening of hearing, respondent moving to have member of the panel disqualified on basis of "apprehended bias" - Respondent's motion dismissed

Board decision reported at [1992] OLRB Rep. Feb. 147; Divisional Court decision reported at [1992] OLRB Rep. July 885.

Ontario Court of Justice, Divisional Court, O'Driscoll, H. Smith and Adams JJ., January 8, 1993.

O'DRISCOLL J. (ORALLY): At the opening of this appeal, Mr. Cherniak, counsel for Ellis-Don, brought a motion on behalf of his client and asked one of the members of this panel, namely Mr. Justice Adams, to disqualify himself from hearing these appeals. Mr. Cherniak stated that it was the first time in 32 years of practice that he had ever brought a motion asking a judge to disqualify himself on the basis of "apprehended bias". Mr. Cherniak submitted that Adams J.'s apprehended bias arose from the fact that he had been Chairman of the Ontario Labour Relations Board (OLRB) when the *Consolidated-Bathurst* case arose and, as G.W. Adams, Q.C., authored the OLRB's decision: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1983] OLRB Rep. December 1995, made on a reconsideration of [1983] OLRB September 1411. That matter wound its way to the Supreme Court of Canada through the Divisional Court: (1985), 51 O.R. (2d) 481 and the Court of Appeal for Ontario: (1986), 56 O.R. (2d) 513. The decision of the Supreme Court of Canada is reported: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

The decision of the then Chairman of the OLRB was upheld by the Supreme Court of Canada.

During the course of today's submissions, Adams J. told Mr. Cherniak that he left the OLRB in 1984, never to return.

The appeal before us arises from a matter that was before the OLRB in 1990. The OLRB rendered what is referred to in the material as its "Final Decision" on February 28, 1992.

There is no suggestion that Adams J. has any interest, personal or otherwise, in the proceedings before us.

Mr. Cherniak relies on the doctrine and theory of "apprehended bias" as enunciated in two (2) decisions of the Supreme Court of Canada:

1. *Committee for Justice and Liberty et al. v. National Energy Board* (1976), 68 D.L.R. (3d) 716, 732, and;
2. *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833

In giving judgment for the Court in *National Energy Board*, (supra), Laskin C.J.C. said:

"The vice of reasonable apprehension of bias lies not in finding correspondence between the decisions in which Mr. Crowe participated and all the statutory prescriptions under s.44, especially when that provision gives the Board broad discretion 'to take into account all such matters as to it appear to be relevant', but rather in the fact that he participated in working out some at least of the terms on which the application was later made and supported the decision to make it." ...

• • • •

When the concern is, as here, that there be no prejudgment of issues (and certainly no predetermination) relating not only to whether a particular application for a pipeline will succeed but also to whether any pipeline will be approved, the participation of Mr. Crowe in the discussions and decisions leading to the application made by the Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity, in my opinion, cannot by give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, ...

• • • •

This Court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi v. Minister of Highways (B.C.)* (1966), 56 D.L.R. (2d) 469, [1966] S.C.R. 367, 55 W.W.R. 750, and again in *Blanchette v. C.I.S. Ltd.* (1973), 36 D.L.R. (3d) 561, [1973] S.C.R. 833, [1973] 5 W.W.R. 547 (where Pigeon, J., said at p. 579 D.L.R., p. 842-3 S.C.R., that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is *ground for disqualification*"), was merely restating what Rand, J., said in *Szilard v. Szasz*, [1955] 1 D.L.R. 360 at p. 373, [1955] S.C.R. 3 at pp. 6-7, in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be".

The issues before us, as pointed out by Ms. McIntosh, are:

1. Does s.111 of the *Labour Relations Act* provide absolute immunity to the persons sought to be exempt?
2. What is the scope, if any, of those same persons with regard to common law immunity?

There is no suggestion that G.W. Adams, as Chairman of the OLRB, nor Adams J. ever decided the questions that we face on these appeals from Steele J. In any event, had he decided the issues as a judge or decided them as Chairman of the OLRB, in our view, it would be immaterial.

In *Consolidated-Bathurst*, (supra), subsequent to the OLRB's decision to refuse a re-hearing, an application was brought to the Divisional Court to quash *subpoenae* served upon various members of the OLRB. Galligan J., sitting as a single judge of the Divisional Court, on September 11, 1984, allowed the motion and quashed the *subpoenae* on the basis that s.109, now section 111, of the *Labour Relations Act*, gave absolute immunity to those persons. This appeal revisits the issues faced by Galligan J. (supra).

We do not wish to see any apprehension of bias in any case. However, by the same token, a judge has no need to disqualify himself or herself because he or she once took a position in days of yore, before being appointed a judge, on some topic or another.

This is an appropriate time and place to recall the words of Chief Justice Laskin in *Morgentaler v. R.* [S.C.C. motion No. 13504; October 2, 1974 - reproduced in McGill Law Journal: [(1983-84) McGill L.J. 369, 405]:

"We have listened to submissions by counsel for the appellant challenging the propriety of one of our members, Mr. Justice de Grandpré, sitting on this appeal. Counsel for the appellant says that he does not attack the personal integrity of Mr. Justice de Grandpré or his objectivity, but he suggests that in view of the wide ranging debate going on in Canada on abortion Mr. Justice de Grandpré's attitude to this appeal could be influenced by reason of views, expressed in a speech and comments made by him during a joint meeting in April, 1973 of the Quebec Branch of the Canadian Bar Association and of the Quebec Bar. Mr. Justice de Grandpré was then President of the Canadian Bar Association but he made it quite clear that he was expressing personal views.

This Court is not concerned in this appeal with the public debate on abortion. Its sole concern is with the exercise of its jurisdiction to hear this appeal on questions of law. This is prescribed by s. 618(2) of the Criminal Code under which the appeal has been brought.

Every judge of this Court has subscribed to an oath in the following terms:

I, do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as Chief Justice (or as one of the judges) of the Supreme Court of Canada. So help me God.

All members of this Court, past and present, have, to a greater or lesser degree, before appointment to the Bench and to this Court, expressed views on questions which have legal connotations, and this has never been a disqualifying consideration.

We are all of the opinion that there is no impropriety in Mr. Justice de Grandpré taking his seat as a member of this Court in this appeal."

In our view, the motion is devoid of any merit and is dismissed.

We reserve the question of costs until the close of the appeal that we will now hear.

1171-89-FC; 1545-89-R (Court File No. M6032) Knob Hill Farms Limited, Applicant v. The United Food and Commercial Workers Union, Local 206, The Crown in right of Ontario (Minister of Labour), the Ontario Labour Relations Board and Susan Caterina, Respondents

First Contract Arbitration - Judicial Review - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to subsection 40a(22) of the *Act* - Employer applying for judicial review on ground that the union had ceased to exist and, therefore, lacked the legal status to request conciliation (which was a statutory pre-condition for the Board's decision) - Employer also submitting that that Board committed jurisdictional error in its interpretation of s.40a(22) of the *Act* - Judicial Review application dismissed by Divisional Court - Application for leave to appeal dismissed by Court of Appeal

Board decision reported at [1991] OLRB Rep. April 521; Divisional Court decision reported at [1991] OLRB Rep. Nov. 1325.

Court of Appeal for Ontario, Blair, Tarnopolsky and Carthy, JJ.A., January 11, 1993.

BLAIR J.A. (endorsement): The application for leave to appeal is dismissed.

2018-88-U; 2019-88-U; 3122-88-U (Court File No. 325/90) Plaza Fibreglas Manufacturing Limited, Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd. and Sabina Citron, Applicants v. Ontario Labour Relations Board and United Steelworkers of America, Respondents

Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Judicial Review - Lockout - Natural Justice - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs - Board ordering employer to return work to original company and make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees - Employer applying

for judicial review and submitting that Board exceeded its jurisdiction and breached rules of natural justice - Judicial review application dismissed by Divisional Court

Board decision reported at [1990] OLRB Rep. Feb. 192

Ontario Court of Justice (Divisional Court), O'Driscoll, Smith and Adams JJ., January 26, 1993.

ADAMS J.: This is an application for judicial review of a decision of the Ontario Labour Relations Board dated February 23, 1990 concerning certain unfair labour practice findings arising out of collective bargaining for a second collective agreement between the Respondent United Steelworkers of America (hereinafter "the Steelworkers") and the two Applicants, Plaza Fibreglas Manufacturing Ltd. and Plaza Electroplating Ltd. (hereinafter referred to collectively as "Plaza"). The Applicant Citcor Manufacturing Ltd. (hereinafter "Citcor") is a company to whom Plaza assigned work during the course of these negotiations. The Steelworkers successfully claimed this assignment violated various provisions of the *Ontario Labour Relations Act*, R.S.O. 1980, c.228 as amended ("the Act"). Mrs. Sabina Citron is the owner and directing manager of the three applicant companies.

The Applicants submit that the Ontario Labour Relations Board ("OLRB") exceeded its jurisdiction and breached the requirements of natural justice in the following manner:

- (a) by awarding compensation to employees despite evidence that Plaza had ceased business by the time of the hearing; by refusing to accept tendered evidence after the conclusion of the hearing that the Applicant Citcor had also effectively ceased business; and by refusing to accept tendered evidence after the conclusion of the hearing that the employees awarded compensation by the OLRB had been awarded termination pay and severance pay under the *Employment Standards Act* arising out of the same circumstances;
- (b) by finding a breach of the bargaining duty in the face of evidence of earlier successful negotiations and that the Plaza negotiating team was headed by an experienced labour negotiator who briefed Mrs. Citron which resulted in a patently unreasonable finding that the principal of a closely held corporation must attend all bargaining sessions; and
- (c) by requiring Plaza to disclose strike contingency plans while acknowledging that the union was entitled to keep its own strike strategy confidential.

An application dated November 24th, 1988 alleging an unlawful lock-out and an unfair labour practice complaint of the same date alleging breaches of sections 15 (the bargaining duty) 64, 66 and 70 (the unfair labour practice provisions) and section 75 (the unlawful lock-out provision) of the Act were brought against the four applicants. Subsequently, on March 20th, 1989 an unfair labour practice complaint was brought against Plaza and Sabina Citron alleging breaches of sections 15, 40(1) (the exclusive bargaining agent provision) and 64, 66 and 70 of the Act.

An application for certification by the Steelworkers in relation to the two Plaza companies was brought in September of 1985. A first collective agreement was not negotiated until October 20th, 1986 and only following the certification of the Steelworkers because of Plaza's unfair labour practices. There was also a finding of contempt against Mrs. Citron on April 14th, 1986. On that occasion the Court stated:

We think the facts show conclusively that the company has embarked on a course of action that was intended deliberately to delay and frustrate the certification procedures established by the Board.

On November 14th, 1988, the parties were in timely strike and lockout positions with respect to their renewal negotiations. Prior to that point in time, Plaza Fibreglas employed 200 employees and produced "production" hoods for Navistar and Volvo GM. Approximately 60 to 65 percent of the hood were manufactured for Navistar and the remainder primarily for Volvo GM. About 1% of the work of this plant also involved the manufacture of "service" hoods for the replacement market. Plaza Electroplating employed 25 to 30 employees in the repair of damaged bumpers and with respect to other electroplating repair work. These two plants were located within the boundaries of Metropolitan Toronto which the OLRB determined to be the geographic area defining the ambit of the Steelworkers' bargaining rights.

However, in mid-June of 1988, Mrs. Citron decided to commence the production of service hoods through Citcor at its Concord plant. This location is outside the reach of the trade union's bargaining rights. By September or October of 1988, equipment had been transferred there from Plaza and 7 employees had been hired by Citcor to manufacture the service hoods. The trade union was not told of this transfer of work. Indeed, on October 18th, 1988 it was assured by Plaza's negotiator that no movement of work was intended. The Steelworkers, in response, dropped its demand for an expanded recognition clause.

On November 12th, 1988 all Plaza employees were suddenly laid off and 80 molds were transferred to Citcor. That company then commenced to produce production hoods for both Navistar and Volvo GM. By March 1989 there were approximately 110 employees working for Citcor. The transfer of this work; the failure to disclose the intended transfer to the Steelworkers during bargaining; and the hiring of Plaza bargaining unit employees to work at Citcor's Concord location were all challenged by the Steelworkers before the OLRB. As well, Mrs. Citron was again found in contempt when she refused to produce Citcor's employee application forms as directed by the Board. The Court's decision in this respect is dated May 10th, 1989. Finally, Navistar ceased being a customer of Plaza by July, 1989.

The hearing before the OLRB was completed November 16th, 1989. On November 30th, 1989 counsel for the applicants wrote to the Board and requested it take into account that Volvo GM was not accepting product from any of the companies and that essentially all operations had ceased. The Steelworkers replied on December 5th, 1989 objecting to the introduction of this evidence following the conclusion of the hearing. On January 15th, 1990, counsel again wrote to the OLRB indicating that there had been issued an Employment Standards Branch order directing Plaza to pay severance and termination pay to employees affected by the transfer of work to Citcor and that the award and payment of these funds were relevant to the proceedings before the OLRB. The trade union also objected to the introduction of this evidence on the basis that it went only to the issue of remedy and could be dealt with in subsequent proceedings.

The OLRB accepted the Steelworkers' submissions and the hearing was not reconvened. The Board's reason for not reopening the proceedings prior to the release of its decision were fully articulated in a written decision dated April 11th, 1990. A motion to stay the Board's order was refused by Montgomery J. on May 22nd, 1990.

The OLRB has yet to fashion a final monetary order. The proceedings giving rise to the challenged decision were generally confined to the Steelworkers' substantive claims and related non-monetary relief as is the OLRB's practice. The precise monetary remedy was left to another hearing failing agreement by the parties. The facts relating to Plaza and Citcor having ceased operations and to

the Employment Standards Branch order are all matters in our view, reasonably left by the OLRB to a subsequent hearing dealing with remedy. The Board's reasons are thoughtfully set out in its decisions of February 23rd and April 11th, 1990. Moreover, if there are substantive implications relating to any of this evidence, the applicants have the right to apply for reconsideration.

One can appreciate why the OLRB was reluctant to reopen the earlier proceedings given the *prima facie* nature of the evidence the applicants sought to adduce and having regard to the already lengthy passage of time. It must be appreciated that this litigation was taking place in the context of an economic confrontation between the parties. In such circumstances, the expedition of the proceeding was given appropriate emphasis. We also note that at no time since the release of the Board's decision of February 23rd, 1990 have the applicants sought reconsideration or a further hearing before the Board to make the representations that they made before this Court. There is no indication that the OLRB intended to award "double compensation" and thereby punish the applicants. Nor can we find a breach of natural justice given the OLRB's willingness to entertain all of the applicants' representations failing agreement with the Steelworkers.

We are also of the view that the OLRB did not commit a jurisdictional error in holding that Plaza had failed to send an informed bargaining team to the negotiating table. There was ample evidence to support the Board's ruling which we believe to be confined to the peculiar facts found by the Board. It is not appropriate on judicial review to dissect the evidence. This is a matter drawing on the OLRB's labour relations expertise and its understanding of the practical implications of the ruling it made. We cannot find its decision patently unreasonable in all of the circumstances.

Mrs. Citron's liability was confined to her breaches of section 64 and did not embrace losses flowing from violations of sections 15 and 75. These latter provisions may only be violated by a corporate or employing entity. The OLRB was very careful to limit Mrs. Citron's liability to that aspect of her conduct which violated section 64. While these same actions were the basis for finding that the corporate applicants also breached 64, we are satisfied there were circumstances before the Board to justify it holding Mrs. Citron personally accountable. She was instrumental in the movement of the work outside the ambit of the trade union's bargaining rights. She dealt directly with the employees to facilitate the staffing of the Concord location. She has exhibited a long-standing opposition to her employees exercising their rights under the Act. Having regard to the exceptional circumstances reflected in the substantial history of this matter, we can find no jurisdictional error in the Board's determination that Mrs. Citron was jointly and severally liable for the specified breaches of section 64.

Finally, we are satisfied the OLRB did not commit a jurisdictional error in holding that Plaza was obligated to disclose its intention to move work to another location. It was argued that the OLRB had effectively obligated the employer to disclose strike contingency plans and that this was a patently unreasonable result given the nature of our bargaining system. However, a review of the OLRB's decision discloses that the Board's motivation was the belief, supported by at least some evidence, that soon after October 18th, 1988 Mrs. Citron decided to move work permanently from the Metropolitan Toronto locations to Citcor's Concord location in order to undermine the bargaining rights of the Steelworkers. It was acknowledged by the OLRB that the movement of the work may have, in part, been motivated as a strike contingency plan. However, the failure of Mrs. Citron and the corporate applicants to return the work when no strike materialized was judged by the OLRB to be some evidence of an intent to remove the work permanently and thereby undermine the exercise of rights under the Act. While this inference might not be supportable in the context of a mature bargaining relationship, it was an inference the OLRB could reasonably make in the context of the particular collective bargaining relationship before it.

For all of these reasons the application is dismissed. The Respondent trade union is to have its costs both for the earlier stay application in the amount of \$1,500 and for this application in the amount of \$3,500. The Applicants are directed to pay these amounts to the Steelworkers forthwith.

CASE LISTINGS DECEMBER 1992

	PAGE
1. Applications for Certification	1
2. Applications for First Contract Arbitration	9
3. Applications for Declaration of Related Employer.....	9
4. Sale of a Business	10
5. Crown Transfer Act	10
6. Union Successor Rights	10
7. Applications for Declaration Terminating Bargaining Rights.....	11
8. Applications for Declaration of Unlawful Strike (Construction Industry)	12
9. Complaints of Unfair Labour Practice	12
10. Jurisdictional Disputes.....	15
11. Applications for Determination of Employee Status.....	15
12. Complaints under the Occupational Health and Safety Act	16
13. Construction Industry Grievances	19
14. Applications for Reconsideration of Board's Decision	19

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0193-91-R: United Food and Commercial Workers International Union ("UFCW") (Applicant) v. Parnell Foods Limited ("Parnell") (Respondent) v. Ontario Public Service Employees Union ("OPSEU") (Intervener)

Unit #1: "all employees of Parnell Foods Limited at the Metro West Detention Centre in Metropolitan Toronto, save and except Assistant Managers, persons above the rank of Assistant Manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Clarity note*)

Unit #2: "all employees of Parnell Foods Limited at the Metro West Detention Centre in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Assistant Manager and persons above the rank of Assistant Manager, office and clerical staff" (2 employees in unit) (*Clarity note*)

0194-91-R: United Food and Commercial Workers International Union ("UFCW") (Applicant) v. Parnell Foods Limited ("Parnell") (Respondent) v. Ontario Public Service Employees Union ("OPSEU") (Intervener)

Unit: "all employees of Parnell Foods Limited at the Maplehurst Correctional Centre in Milton, save and except Assistant Managers and persons above the rank of Assistant Manager, office and clerical staff" (11 employees in unit) (*Clarity note*)

0473-92-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Applicant) v. Locam Truck Rental & Leasing Inc. (Respondent)

Unit: "all employees of Locam Truck Rental & Leasing Inc. in the City of Gloucester, save and except forepersons, persons above the rank of foreperson, office and sales staff, counter sales clerks, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

1579-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of Zellers Inc. at its store at 6777 Morrison St. in the Municipality of Niagara Falls, save and except Supervisors/Group Merchandisers and persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Operator, personnel and office supervisor, personnel clerk, persons regularly employed for not more than 24 hours per week and students employed in a co-operative work program" (32 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of Zellers Inc. at its store at 6777 Morrison St. in the Municipality of Niagara Falls, regularly employed for not more than 24 hours per week, save and except Supervisors/Group Merchandisers and persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Operators, personnel and office supervisor, personnel clerk, and students employed on a co-operative work program" (80 employees in unit) (*Having regard to the agreement of the parties*)

1790-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto

Condominium Corporation #880; Metropolitan Toronto Condominium Corporation #897; Metropolitan Toronto Condominium Corporation #934; (Respondent)

Unit: "All employees of Metropolitan Toronto Condominium Corporation #880, #897 and #934 at 215, 205 and 195 Wynford Drive in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, security guards and office and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

1804-92-R: The Inzola Employees Association (Applicant) v. Inzola Construction (1976) Limited (Respondent)

Unit: "all employees of Inzola Construction (1976) Limited in the Regional Municipality of York, the Regional Municipality of Peel, the Regional Municipality of Durham, the Regional Municipality of Hamilton-Wentworth, the Regional Municipality of Waterloo and the County of Wellington, save and except non-working foremen, persons above the rank of non-working foreman and office and clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

1846-92-R: Labourers' International Union of North America, Local 527 (Applicant) v. Jomco Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Jomco Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Jomco Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2024-92-R: Labourers' International Union of North America, Local 527 (Applicant) v. Diamond Restoration (Respondent)

Unit: "all construction labourers in the employ of Diamond Restoration in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Diamond Restoration in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2089-92-R: Canadian Union of Public Employees (Applicant) v. Family Service Centre of Ottawa-Carleton (Respondent)

Unit: "all employees of the Family Service Centre of Ottawa-Carleton in the Regional Municipality of Ottawa-Carleton save and except program supervisors and persons above the rank of program supervisor, accounting clerk, students employed during the school vacation period and students employed in co-operative education programs" (19 employees in unit) (*Having regard to the agreement of the parties*)

2182-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Ingerwood Construction Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Ingerwood Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Ingerwood Construction Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2185-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ingerwood Construction

Ltd. (Respondent) v. Labourers' International Union of North America, Local 1059 (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of Ingerwood Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Ingerwood Construction Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2310-92-R: Bakery, Confectionery and Tobacco Worker's International Union Local 364T (Applicant) v. Imasco Limited in its Imperial Leaf Tobacco - Division (Respondent)

Unit: "all employees of Imasco Limited in its Imperial Leaf Tobacco Division at its plant at 250 Elm Street in the Town of Aylmer, save and except foreperson, persons above the rank of foreperson, office, clerical and technical, grading and buying staff, security guards, students employed under a co-operative training program from a college or university and persons for whom any trade union held bargaining rights as of November 9, 1992" (3 employees in unit) (*Having regard to the agreement of the parties*)

2322-92-R: Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Victorian Order of Nurses, Thunder Bay and District Branch (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the Victorian Order of Nurses, Thunder Bay and District Branch in Thunder Bay, save and except Supervisors, persons above the rank of Supervisor, Confidential Secretary to the Chief Executive Officer and Director of Homecare, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of November 6, 1992" (19 employees in unit) (*Having regard to the agreement of the parties*)

2366-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. National Federation of Nurses' Unions (Respondent)

Unit: "all employees of the National Federation of Nurses' Unions in the City of Ottawa, save and except elected officials, the Executive Director and persons above the rank of Executive Director" (2 employees in unit) (*Having regard to the agreement of the parties*)

2392-92-R: Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters AFL-CIO (Applicant) v. Goodwill Industries of Toronto (Respondent)

Unit: "all employees of Goodwill Industries of Toronto in its retail division at 465 Parliament Street in the Municipality of Metropolitan Toronto, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager, office, clerical, security and professional staff, disabled client employees on the rolls of the Rehabilitation Division, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

2411-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Joh Rubber Investments Limited Partnership (Respondent) v. Group of Employees, Objectors (Objectors)

Unit: "all employees of Joh Rubber Investments Limited Partnership in the Town of Leamington, save and except co-ordinators, persons above the rank of co-ordinator, office and sales staff and students employed during the school vacation period" (49 employees in unit) (*Having regard to the agreement of the parties*)

2412-92-R: Ontario Public Service Employees Union (Applicant) v. Homes First Society (Respondent)

Unit: “all employees of Homes First Society in the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed on a co-operative program from a school college or university” (35 employees in unit) (*Having regard to the agreement of the parties*)

2413-92-R: Bakery, Confectionery and Tobacco Workers' International Union Local 284 (Applicant) v. Bennett's Bakery Ltd. (Respondent)

Unit: “all employees of Bennett's Bakery Ltd. at 899 Tungsten Road in Thunder Bay, save and except drivers, driver salesmen, forepersons, persons above the rank of foreperson, deli department personnel, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

2450-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. C & M McNally Engineering Inc. (Respondent)

Unit: “all employees of C & M McNally Engineering Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of C & M McNally Engineering Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2464-92-R: Health, Office and Professional Employees Union Division of Local 175, United Food and Commercial Workers International Union, CLC, AFL - CIO (Applicant) v. Erin Mills Retirement Lodge (Respondent)

Unit: “all employees of Erin Mills Retirement Lodge in the City of Mississauga regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office staff” (32 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2472-92-R: Gogama Forest Products Employee Association (Applicant) v. Gogama Forest Products Ltd. (Respondent)

Unit: “all employees of Gogama Forest Products Ltd. at its Wood Fibre Processing Plant and Work Sites in the Yard, located at or near the CN siding of Ostrom, Hwy. 560 in Westbrook Township, save and except foremen, persons above the rank of foreman, office and sales staff” (30 employees in unit) (*Having regard to the agreement of the parties*)

2483-92-R: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Target Motors Inc. (Respondent)

Unit: “all employees of Target Motors Inc. in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week” (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2501-92-R: Laundry and Linen Drivers and Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Goodwill Industries of Toronto (Respondent)

Unit: “all employees of Goodwill Industries of Toronto at its Retail Division at 2533 Danforth Avenue in the Municipality of Metropolitan Toronto, save and except Assistant Manager, persons above the rank of Assis-

tant Manager, office, clerical, security and professional staff, disabled client-employees on the rolls of the Rehabilitation Division, and students employed during the school vacation period” (2 employees in unit) (*Having regard to the agreement of the parties*)

2532-92-R: Ontario Public Service Employees Union (Applicant) v. Children’s Aid Society of Brockville and the United Counties of Leeds and Grenville (Respondent)

Unit: “all employees of the Children’s Aid Society of Brockville and the United Counties of Leeds and Grenville in the United Counties of Leeds and Grenville, save and except Supervisors, persons above the rank of Supervisor, Financial Assistant, Secretary to the Executive Director, any member of the legal profession entitled to practice in Ontario and employed in a professional capacity and persons regularly employed for not more than 24 hour per week” (40 employees in unit) (*Having regard to the agreement of the parties*)

2560-92-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Arcam Engineering Ltd. (Respondent)

Unit: “all construction labourers in the employ of Arcam Engineering Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Arcam Engineering Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2561-92-R: Canadian Security Union (Applicant) v. Hargrave Security International (1986) Inc. (Respondent)

Unit: “all security guards in the employ of Hargrave Security International (1986) Inc. at #1 Quality Way in the City of Windsor, save and except sub-supervisors and persons above the rank of sub-supervisor” (20 employees in unit) (*Having regard to the agreement of the parties*)

2570-92-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America UAW (Applicant) v. Centroy Assembly Ltd. (Respondent)

Unit: “all employees of Centroy Assembly Ltd. in the Town of Strathroy, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (19 employees in unit) (*Having regard to the agreement of the parties*)

2583-92-R: Ontario Public School Teachers’ Federation (Applicant) v. The Lanark County Board of Education (Respondent)

Unit: “all occasional teachers employed by The Lanark County Board of Education in its elementary schools in the County of Lanark, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act” (151 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2592-92-R: Ontario Nurses’ Association (Applicant) v. The Christian and Missionary Alliance Eastern and Central Canadian District o/a Cama Woodlands (Respondent)

Unit: “all registered and graduate nurses employed by The Christian and Missionary Alliance Eastern and Central Canadian District o/a Cama Woodlands in the City of Burlington, save and except Directors of Nursing and persons above the rank of Director of Nursing” (10 employees in unit) (*Having regard to the agreement of the parties*)

2622-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Apollo 8 Maintenance Services Limited (Respondent)

Unit #1: “all employees of Apollo 8 Maintenance Services Limited employed at the Standard Life Centre, 121 King Street West in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week” (18 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of Apollo 8 Maintenance Services Limited regularly employed for not more than 24 hours per week employed at the Standard Life Centre, 121 King Street West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) *(Having regard to the agreement of the parties)*

2632-92-R: Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Goodwill Industries of Toronto (Respondent)

Unit: “all employees of Goodwill Industries of Toronto at its Retail Division at 3905 Keele Street in the Municipality of Metropolitan Toronto, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager, office, clerical, security and professional staff, disabled client-employees on the rolls of the Rehabilitation Division and students employed during the school vacation period” (6 employees in unit) *(Having regard to the agreement of the parties)*

2633-92-R: Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Goodwill Industries of Toronto (Respondent)

Unit: “all employees of Goodwill Industries of Toronto at its Retail Division at 1943 Weston Road in the Municipality of Metropolitan Toronto, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, office, clerical, security and professional staff, disabled client-employees on the rolls of the Rehabilitation Division and students employed during the school vacation period” (3 employees in unit) *(Having regard to the agreement of the parties)*

2663-92-R: Association of Professional Student Services Personnel (Applicant) v. Waterloo Region Roman Catholic Separate School Board (Respondent)

Unit: “all social workers, behaviour consultants, speech and language pathologists and attendance counsellors employed by the Waterloo Region Roman Catholic Separate School Board in the Regional Municipality of Waterloo, save and except supervisors and persons above the rank of supervisor” (12 employees in unit) *(Having regard to the agreement of the parties)*

2673-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Niagara Women In Crisis (Respondent)

Unit: “all employees of Niagara Women in Crisis in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, secretary bookkeeper, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (4 employees in unit) *(Having regard to the agreement of the parties)*

2687-92-R: The International Ladies' Garment Workers Union A.F.L. C.I.O. C.L.C. (Applicant) v. The Chinese Family Life Services of Metro Toronto (Respondent)

Unit: “all employees of The Chinese Family Life Services of Metro Toronto in Metropolitan Toronto, save and except administrative assistants and those persons above the rank of administrative assistant” (7 employees in unit) *(Having regard to the agreement of the parties)*

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1839-92-R: Independent Paperworkers of Canada (Applicant) v. MacMillan Bathurst Inc. (Respondent) v. The Canadian Paperworkers Union (Intervener)

Unit: “all employees of MacMillan Bathurst Inc. at its Guelph plant, save and except production supervisors, persons above the rank of production supervisors, clerical and sales staff, field representatives and design department” (97 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	99
Number of persons who cast ballots	92

Number of spoiled ballots	1
Number of ballots marked in favour of applicant	86
Number of ballots marked in favour of intervener	5

1840-92-R: Independent Paperworkers of Canada (Applicant) v. Domtar Inc. (Respondent) v. The Canadian Paperworkers Union (Intervener)

Unit: “all employees of Domtar Inc. in its plant situated at Peterborough, Ontario, save and except foremen, persons above the rank of foreman, office personnel, sales staff, watchmen and guards, and employees engaged in a confidential capacity relating to labour relations” (40 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	41
Number of persons who cast ballots	41
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	37
Number of ballots marked in favour of intervener	2

1884-92-R: Independent Paperworkers of Canada (Applicant) v. Domtar Inc. (Respondent) v. The Canadian Paperworkers Union (Intervener)

Unit: “all employees of Domtar Inc. in its Etobicoke plant situated at 450 Evans Avenue, Toronto M8W 1T5, Ontario, save and except foremen and above, plant security guards, office staff, sales trainees, time study and methods personnel and employees engaged in a confidential capacity relating to labour relations” (150 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	130
Number of persons who cast ballots	130
Number of spoiled ballots	7
Number of ballots marked in favour of applicant	77
Number of ballots marked in favour of intervener	46

2216-92-R: United Steelworkers of America (Applicant) v. G.C.S. Hotel Holdings Canada Inc. (Respondent) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Intervener)

Unit: “all employees of G.C.S. Hotel Holdings Canada Inc. employed at its hotel in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff” (185 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	185
Number of persons who cast ballots	120
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	120
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	118
Number of ballots marked in favour of intervener	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1996-92-R: IWA-Canada, Local 2693 (Applicant) v. Corporation of the Town of Longlac (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of Corporation of The Town of Longlac, save and except foremen, persons above the rank of foreman, office and clerical staff, Day Care employees, Medical Clinic employees, students, and special government grant employees” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	4
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Number of persons who cast ballots	3
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2

Unit #2 (see Applications for Certification Dismissed subsequent to a Post-Hearing Vote)

Applications for Certification Dismissed Without Vote

0437-91-R: Ontario Public Service Employees Union ("OPSEU") (Applicant) v. Parnell Foods ("Parnell") (Respondent) v. Retail, Wholesale and Department Store Union, Local 414 ("RWDSU")(Intervener)

2549-92-R: Graphic Communications International Union, Local 500M (Applicant) v. St. Joseph Printing Limited (Respondent)

2593-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Capital-Metro Taxi of Ottawa Limited c.o.b. as Capital Taxi (Respondent)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0599-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The Brick Warehouse Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of The Brick Warehouse Corporation employed at its locations at 1165 Kennedy Road and 18 Nantucket Boulevard in the City of Scarborough, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (47 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	3

1996-92-R: IWA-Canada, Local 2693 (Applicant) v. Corporation of the Town of Longlac (Respondent) v. Group of Employees (Objectors)

Unit #1: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

Unit #2: "all employees of Corporation of the Town of Longlac employed at its Medical Clinic, save and except supervisors, and persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2

Applications for Certification Withdrawn

0409-92-R: Construction Workers Local 53, CLAC (Applicant) v. Dayus Roofing Company Limited (Respon-

dent) v. Sheet Metal Workers' International Association, Local 235 and Ontario Sheet Metal Workers' Conference (Intervener)

2086-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Arnsby M F Property Management Ltd. (Respondent)

2276-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. C & C Plumbing Excavating Ltd. (Respondent)

2404-92-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141 (Applicant) v. Moffatt & Powell Limited, Goderich (Respondent)

2509-92-R: Christian Labour Association of Canada (Applicant) v. Village Haven Rest Home (Respondent)

2511-92-R: Administrative Support Employees' Association (Applicant) v. Waterloo Region Roman Catholic Separate School Board (Respondent)

2566-92-R: Canadian Union of Public Employees Local 3569 (Applicant) v. Thunder Bay District Health Unit (Respondent)

FIRST AGREEMENT - DIRECTION

2720-92-FC: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. The Brick Warehouse Corporation (City of St. Catharines) (Respondent) (*Dismissed*)

2728-92-FC: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. The Brick Warehouse Corporation (City of Burlington) (Respondent) (*Dismissed*)

2729-92-FC: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. The Brick Warehouse Corporation (1352 Dufferin Street, Toronto) (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1321-91-R: Ottawa-Carleton Public Employees Union, Local 503 (Applicant) v. Regional Municipality of Ottawa-Carleton and Carlington Community Services Centre and Dalhousie Community Services Centre and Gloucester Community Services Centre and Lowertown Community Services Centre and Overbrook Community Services Centre and , South East Ottawa Community Services Centre and Vanier Community Services Centre and Centretown Community Services Centre (Respondents) (*Withdrawn*)

1971-91-R: The Canadian Textile and Chemical Union (Applicant) v. Union Felt Products (Ontario) Ltd., Almac Products Inc. and Almac Industries Inc. (Respondents) v. United Steelworkers of America, Upholstering & Allied Industries Division (U.D.) (Intervener) (*Granted*)

0507-92-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Eton Construction Limited and Les Entreprises de Construction Brittany Inc. (Respondents) (*Withdrawn*)

1393-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. John Maggio Excavating Ltd.; Steven Maggio O/A J.R.L. Contracting (Respondents) (*Withdrawn*)

1572-92-R: Motion Picture Projectionists Union Local 303 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. 766280 Ontario Limited c.o.b. as Starlite Drive-In Theatre; 983120 Ontario Limited c.o.b. as Starlite Drive-In Theatre; Joymarmon Properties Inc. (Respondents) (*Granted*)

1789-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto

Condominium Corporation #880; Metropolitan Toronto Condominium Corporation #897; Metropolitan Toronto Condominium Corporation #934 (Respondents) (*Granted*)

SALE OF A BUSINESS

1321-91-R: Ottawa-Carleton Public Employees Union, Local 503 (Applicant) v. Regional Municipality of Ottawa-Carleton and Carlington Community Services Centre and Dalhousie Community Services Centre and Gloucester Community Services Centre and Lowertown Community Services Centre and Overbrook Community Services Centre and South East Ottawa Community Services Centre and Vanier Community Services Centre and Centretown Community Services Centre (Respondents) (*Withdrawn*)

1971-91-R: The Canadian Textile and Chemical Union (Applicant) v. Union Felt Products (Ontario) Ltd., Almac Products Inc. and Almac Industries Inc. (Respondents) (*Granted*)

0507-92-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Eton Construction Limited and , Les Entreprises de Construction Brittany Inc. (Respondents) (*Withdrawn*)

1572-92-R: Motion Picture Projectionists Union Local 303 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. 766280 Ontario Limited c.o.b. as Starlite Drive-In Theatre; 983120 Ontario Limited c.o.b. as Starlite Drive-In Theatre; Joymarmon Properties Inc. (Respondents) (*Granted*)

1991-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cameus Holdings Inc., Riverbank Developments Ltd. (Respondents) (*Granted*)

2523-92-R: Amalgamated Clothing and Textile Workers' Union Toronto Joint Board (Applicant) v. 997441 Ontario Inc. and Harris Cap and Textiles Company Limited and Harris Cap Inc. (Respondents) (*Granted*)

CROWN TRANSFER ACT

2471-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario, as represented by the Centennial Centre of Science and Technology (Ontario Science Centre), Mil-Dom-Ex Packaging (Respondents) (*Dismissed*)

0470-91-R: Ontario Public Service Employees Union ("OPSEU") (Applicant) v. The Crown in Right of Ontario as Represented by the Ministry of Correctional Services ("MCS") and Parnell Foods Ltd. ("Parnell") (Respondents) (*Dismissed*)

0471-91-R; 0472-91-R: Ontario Public Service Employees Union ("OPSEU") (Applicant) v. The Crown in Right of Ontario as Represented by the Ministry of Correctional Services ("MCS") and Parnell Foods Ltd. ("Parnell") (Respondents) v. United Food & Commercial Workers International Union ("UFCW") (Intervener) (*Granted*)

0473-91-R: Ontario Public Service Employees Union ("OPSEU") (Applicant) v. The Crown in Right of Ontario as represented by The Ministry of Correctional Services ("MCS") and Nutritional Management Services ("Nutritional") (Respondents) v. United Food & Commercial Workers International Union ("UFCW") (Intervener) (*Granted*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2657-92-R: Communications, Energy and Paperworkers Union of Canada, Local 309 (Applicant) v. Don Snow (Respondent) (*Dismissed*)

2658-92-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Stephen Stacey (Respondent) (*Dismissed*)

2659-92-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Don Snow (Respondent) (*Dismissed*)

2660-92-R: Communications, Energy and Paperworkers Union of Canada Local 934 (Applicant) v. Stephen Stacey (Respondent) (*Dismissed*)

2691-92-R; 2692-92-R: Communications, Energy and Paperworkers Union of Canada Local 1335 (Applicant) v. David Matts (Respondent); Communications, Energy and Paperworkers Union of Canada (Applicant) v. David Matts (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0168-90-R: Raymond Thibault (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. F.H.R. Construction Ltd. (Intervener)

Unit: “the employees of F.H.R. Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non working foremen and persons above the rank of non working foreman” (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

0270-92-R: Denis Tremblay (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Respondent) v. Guillot Builders Limited (Intervener)

Unit: “all carpenters and carpenters’ apprentices in the employ of Guillot Builders Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working Foremen and persons above the rank of non-working Foreman” (4 employees in unit) (*Withdrawn*)

0271-92-R: Rolly Simoneau (Applicant) v. International Brotherhood of Painters and Allied Trades (Respondent) v. Guillot Builders Ltd. (Intervener) Unit: “all Painters and Painters’ Apprentices in the employ of Guillot Builders Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working Foremen and persons above the rank of non-working Foreman” (2 employees in unit) (*Withdrawn*)

0272-92-R: Grant Hurd (Applicant) v. Labourers’ International Union of North America, Local 493 (Respondent) v. Guillot Builders Ltd. (Intervener)

Unit: “all Construction Labourers in the employ of Guillot Builders Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working Foremen and persons above the rank of non-working Foreman” (2 employees in unit) (*Withdrawn*)

1310-92-R: David John Beale (Applicant) v. United Food and Commercial Workers International Union, Local 633 (Respondent) v. Cold Springs Food Products (Intervener)

Unit: “all employees of Cold Springs Farm Limited at its Cold Springs Food Products Division, in its pork plant at Thamesford, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff, maintenance staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (54 employees in unit) (*Dismissed*)

1869-92-R: Joseph Komady (Applicant) v. United Steelworkers of America (Respondent) v. Pathex International Ltd. (Intervener)

Unit: “all employees of Pathex International Ltd. in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and clerical staff, sales staff, design and draft staff and students hired for the school vacation period” (48 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	47
Number of persons who cast ballots	47
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	22
Number of ballots marked against respondent	24

2226-92-R: Gary G. Lefrancois, Lawrence R. Ribble and Marcel R. Gervais (Applicant) v. Teamsters Local Union No. 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. WMI Waste Management of Canada, Inc., Halton/Hamilton Division (Intervener)

Unit: “all employees of WMI Waste Management of Canada, Inc., Halton/Hamilton Division, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week” (23 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	27
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	24
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	16

2389-92-R: Employees of Ryder Concrete Forming Specialists Ltd. Gerald Doxtator (Applicant) v. The Labourers’ International Union of North America, Local 837 (Respondent) v. Ryder Concrete Forming Specialists Ltd. (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2475-92-U: Ontario Sheet Metal Workers’ Conference and Sheet Metal Workers’ International Association, Local 30 (Applicant) v. Sheet Metal Workers’ International Association, Local 285 and Rep Ventilation Limited (Respondents) (*Withdrawn*)

2662-92-U: Nicholls-Radtke Ltd. (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663, Ross Tius, Marc Belanger (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2319-91-U: Robert L. Carroll (Complainant) v. U-Haul Co. (Canada) Ltd., c.o.b. as U-Haul Co. of Ontario, a Division of U-Haul Co. (Canada) Ltd., Steven Smithers, Paul Clermont (Respondents) (*Withdrawn*)

3063-91-U: Ontario Secondary School Teachers’ Federation (Complainant) v. 772868 Ontario Limited, c.o.b. as King Square Collegiate, Michael Tam, Richard Fung and James Klukach (Respondents) (*Granted*)

3739-91-U: Luigi (Gino) D’Ovidio (Complainant) v. C.U.P.E. Local # 66 (Respondent) (*Withdrawn*)

4105-91-U: Robert Griffin and Frank Cavanagh (Complainants) v. Employees Association of Kodak Canada (Respondent) v. Kodak Canada Inc. (Intervener) (*Dismissed*)

4109-91-U: United Steelworkers of America (Complainant) v. Erie Beach Hotel Ltd. (Respondent) (*Withdrawn*)

0398-92-U: Sheet Metal Workers' International Association, Local 30 (Complainant) v. Chicago Blower, division of Earls court Metal Industries Ltd. (Respondent) (*Withdrawn*)

0437-92-U: Denis Brochu (Complainant) v. Joseph Collins and National Automobile, Aerospace and Agricultural Implement Worker's Union of Canada (CAW-Canada) (Respondents) v. Atlas Specialty Steels (Intervener) (*Withdrawn*)

0653-92-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Complainant) v. Locam Truck Rental & Leasing Inc. (Respondent) (*Granted*)

0943-92-U: Kamilla Singh (Complainant) v. Service Employees International Union Local 204 (Respondent) v. Mount Sinai Hospital (Intervener) (*Dismissed*)

1031-92-U: Ontario Public Service Employees' Union (Complainant) v. Ottawa General Hospital (Respondent) (*Withdrawn*)

1135-92-U: Sestilio Boiani (Complainant) v. Bricklayers and Masons Independent Union, Local 1 (Respondent) (*Withdrawn*)

1169-92-U: Pamela Sojczynski (Complainant) v. Canadian Union of Public Employees, Local 3459 (Respondent) (*Withdrawn*)

1173-92-U: Mario Maola (Complainant) v. Labourers' International Union of North America, Ontario Provincial District Council and all other affiliated agents of the Labourers' International Union of North America (Respondent) (*Withdrawn*)

1232-92-U: Margaret Christenson (Complainant) v. C.U.P.E. Local 67, Library Group (Respondent) v. Ken Charsley, Joan Zachary, Gayle Shelleau, Sherry Briel, Doreen Hyrsky (Interveners) (*Withdrawn*)

1304-92-U: Local 1-92-3 IWA - Canada (Complainant) v. Kimberly-Clark Canada Inc. (Respondent) (*Withdrawn*)

1319-92-U: Erik Hansink (Complainant) v. Canadian Auto Workers Union, Local 222 (Respondent) v. General Motors of Canada (Intervener) (*Withdrawn*)

1325-92-U; 1617-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Complainant) v. The Brick Warehouse Corporation (Scarborough) (Respondent) (*Withdrawn*)

1372-92-U: Pauline Martin (Complainant) v. Cliff Jewell, President, C.U.P.E. Local 1627 and C.U.P.E. Local 1627 (Respondents) (*Withdrawn*)

1503-92-U: International Association of Machinists and Aerospace Workers (Complainant) v. Zellers Inc. (Respondent) (*Withdrawn*)

1583-92-U: Kris Sri Bhaggyadatta, May Yee and Anita Lau (Complainant) v. Office & Professional Employees International Union (OPEIU), Local 343 (Respondent) (*Withdrawn*)

1809-92-U: United Brotherhood of Carpenters and Joiners of America Local 1072 (Complainant) v. K & F Store Fixtures (Respondent) (*Withdrawn*)

1992-92-U: Labourers' International Union of North America, Local 183 (Complainant) v. Cameus Holdings Inc. and Riverbank Developments Ltd. (Respondents) (*Granted*)

1999-92-U: Helen Sarantopoulos (Complainant) v. Sunnybrook Hospital Employees Union Local 777 (Respondent) (*Withdrawn*)

2043-92-U: The Canadian Union of Public Employees Local 1404 (Complainant) v. St. Joseph's Villa (Respondent) (*Withdrawn*)

2072-92-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Becker Milk Company Ltd. (Respondent) (*Withdrawn*)

2124-92-U: Bruno Raggiunti (Complainant) v. Teamsters Local 230 (Respondent) (*Withdrawn*)

2164-92-U: Maria A. Lasquinha (Complainant) v. Service Employees International Union Local 204 (Respondent) (*Withdrawn*)

2189-92-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Complainant) v. ReNova Windows APM Ltd. (Respondent) (*Withdrawn*)

2195-92-U: Employee's of Benn Iron Foundry (Complainant) v. Union - Local 251 - U.A.W. (Respondent) (*Withdrawn*)

2218-92-U: John Franks (Complainant) v. York University (Respondent) (*Withdrawn*)

2219-92-U: Zellers Inc. (Complainant) v. International Association of Machinists and Aerospace Workers (Respondent) (*Withdrawn*)

2258-92-U: United Food and Commercial Workers International Union AFL-CIO, Local 114P (Complainant) v. Canada Packers Inc. (Respondent) (*Withdrawn*)

2272-92-U: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Complainant) v. R.J. Nicol Construction (1975) Ltd. (Respondent) (*Withdrawn*)

2314-92-U: Norman R. Costigan (Complainant) v. John Caines (Respondent) (*Withdrawn*)

2328-92-U: United Brotherhood of Carpenters and Joiners of America, Local Union 93 and Narciso Hilario Martins (Complainant) v. 519171 Ontario Limited o/a Aable Construction Ltd. (Respondent) (*Withdrawn*)

2335-92-U: Canadian Paperworkers Union its Local 228 (Complainant) v. The Beaver Wood Fibre Company Limited (Respondent) (*Withdrawn*)

2348-92-U: Canadian Union of Public Employees Local 1883 (Complainant) v. Regional Municipality of Waterloo (Respondent) (*Withdrawn*)

2361-92-U: Lawrence O'Ryan (Complainant) v. Canadian Union of Public Employees Local 1247 (Respondent) (*Withdrawn*)

2408-92-U: Melvin Aull (Complainant) v. David Taylor, President Aluminum Brick and Glass Workers Local 260G (Respondent) (*Withdrawn*)

2427-92-U: Austin House and Peter Maruk (Complainant) v. Milk and Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local Union 647 (Respondent) (*Withdrawn*)

2428-92-U: Canadian Union of Public Employees Local 1919 (Complainant) v. Woodland Villa (Omni Health Care Ltd.) (Respondent) (*Withdrawn*)

2434-92-U: United Textile Workers of America (Complainant) v. Bay Mills Limited - Bayex Division (Respondent) (*Withdrawn*)

2467-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. 652605 Ontario Incorporated c.o.b. as LOEB I.G.A. Lincoln Heights (Respondent) (*Withdrawn*)

2474-92-U: Ontario Sheet Metal Workers' Conference and Sheet Metal Workers International Association, Local 30 (Applicants) v. Sheet Metal Workers' International Association, Local 285 and Rep Ventilation Limited (Respondents) (*Withdrawn*)

2485-92-U: International Union of Operating Engineers, Local 793 (Complainant) v. Christman & Associates Contractors Ltd. (Respondent) (*Withdrawn*)

2497-92-U: Assunta Martino (Complainant) v. Canadian Union of Public Employees, Local 2553 (Respondent) (*Dismissed*).

2498-92-U: Christian Parris (Complainant) v. Nirmal Bains, Nitish Roy, Joseph Fuscaldo, Randy Rideout and Local 8694 United Steel Workers of America (Respondents) (*Withdrawn*)

2525-92-U: Medlin Morris (Complainant) v. United Food & Commercial Workers International Union, J. Doron (Respondents) (*Withdrawn*)

2539-92-U: Sonoco Limited (Complainant) v. Canadian Paperworkers Union - CLC, Glen Miller Local 1489 (Respondents) (*Withdrawn*)

2540-92-U: Ontario Public Service Employees Union (Complainant) v. Kennedy House Youth Services Inc. (Respondent) (*Withdrawn*)

2547-92-U: R.J. Nicol Construction (1975) Ltd. (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Respondent) (*Withdrawn*)

2567-92-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Ingerwood Construction Ltd. (Respondent) (*Withdrawn*)

2577-92-U: Daniel Malloy (Complainant) v. Cooper's Crane Rental 1987 Ltd., International Union of Operating Engineers, Local 793 (Respondents) (*Withdrawn*)

2643-92-U: International Union of Operating Engineers, Local 793 (Complainant) v. Ingerwood Construction Ltd. (Respondent) (*Withdrawn*)

2665-92-U: Kevin Lovelace (Complainant) v. CPU Local 69, Brad Jordan President, St. Marys Paper (Respondents) (*Withdrawn*)

2771-92-U: Maria Moreira (Complainant) v. McDonald's Restaurant (Respondent) (*Dismissed*)

2784-92-U: Anthony Mancini (Complainant) v. OECTA (Ontario English Catholic Teachers Association) and The Metropolitan Separate School Board (Respondents) (*Dismissed*)

JURISDICTIONAL DISPUTES

0200-92-JD: James A. Rice Ltd. (Complainant) v. Labourers' International Union of North America, Local 837; United Brotherhood of Carpenters & Joiners of America, Local 18; Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2760-92-M: Canadian Union of Public Employees, Local 1328 (Applicant) v. Metropolitan Separate School Board (Respondent) (*Dismissed*)

2783-92-M: Parkwood Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0524-90-OH: The Ontario Public Service Employees Union and its Local 321 (Complainant) v. Bernice Lowering, Administrator, Edgar Adult Occupational Centre (Respondent) (*Granted*)

3505-91-OH: Ed Blair and Cyril Cornick (Complainants) v. Godfrey Aerospace Inc. (Respondent) (*Withdrawn*)

0003-92-OH: John Harold Gault, Nuclear Security Guard (B.N.P.D.) (Complainant) v. Ontario Hydro and A. Kent Bergstrom (Nuclear Security Supervisor) (B.N.P.D.) (Respondents) (*Withdrawn*)

1598-92-OH: Peggy Conliffe (Complainant) v. Robert Larabee (Respondent) (*Withdrawn*)

1654-92-OH: T. Michael Kennedy (Complainant) v. Toronto Transit Commission (Respondent) (*Withdrawn*)

2405-92-OH: Vince Ward (Complainant) v. Ian Ross Perrigard (Respondent) (*Withdrawn*)

2410-92-OH: R.D. Mackay (Complainant) v. Cannington Excavating 1989 Ltd. (Respondent) (*Withdrawn*)

2528-92-OH: Stephen Beard (Complainant) v. Anchor Welding (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0567-90-G; 3109-91-G; 0783-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. F.H.R. Construction Ltd. (Respondent) (*Granted*)

3144-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Big H Construction Inc. (Respondent) (*Granted*)

3347-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 18 (Applicant) v. C. H. Heist Ltd. (Respondent) (*Terminated*)

3775-91-G: Sheet Metal Workers' International Association Local No. 30 (Applicant) v. A.T.S. Erectors Incorporated (Respondent) (*Withdrawn*)

0575-92-G; 1458-91-G; 1809-91-G; 1910-91-G; 2273-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. R.J. Nicol Construction (1975) Ltd. (Respondent) (*Terminated*)

0587-92-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Technique Environment Corporation (Respondent) (*Granted*)

0886-92-G; 2372-92-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

0936-92-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1036 and Labourers' International Union of North America, Local 491 (Applicants) v. Armbr Construction Limited (Respondent) (*Withdrawn*)

0959-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 1988 (Applicant) v. Bel-lai Brothers (Respondent) (*Withdrawn*)

1511-92-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Withdrawn*)

1700-92-G: Ontario Allied Construction Trades Council on behalf of the United Brotherhood of Carpenters

and Joiners of America (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Dismissed*)

1738-92-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Theo Vandenberg Construction Inc. (Respondent) (*Granted*)

1860-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Form-All Construction Ltd. (Respondent) (*Withdrawn*)

2033-92-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Gaspo Construction Ltd. (Respondent) (*Dismissed*)

2036-92-G: International Brotherhood of Painters and Allied Trades District Council 46 (Applicant) v. O. Orticello & Son Limited (Respondent) (*Withdrawn*)

2247-92-G: Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. F. D'Angelo Drywall Systems (Respondent) (*Granted*)

2265-92-G: United Brotherhood of Carpenters and Joiners of America Local Union 27 (Applicant) v. Hellenic Floor Covering Ltd. (Respondent) (*Withdrawn*)

2267-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Blue Mountain Flooring Inc. (Respondent) (*Withdrawn*)

2304-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. R.J. Nicol Construction (1975) Ltd. (Respondent) (*Withdrawn*)

2375-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Chalkboard Installation (Respondent) (*Granted*)

2460-92-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. True North Installations Inc. (Respondent) (*Granted*)

2473-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Kor-Ban Inc. (Respondent) (*Granted*)

2489-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bellin Construction (Respondent) (*Withdrawn*)

2494-92-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Canadian Escalator and Elevator Service Company Limited (Respondent) (*Granted*)

2496-92-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 759 (Applicant) v. Northern Reinforcing Products Ltd. (Respondent) (*Withdrawn*)

2519-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Verastar Forming Ltd. (Respondent) (*Granted*)

2538-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mississauga Cement Forming Ltd. (Respondent) (*Withdrawn*)

2550-92-G: International Brotherhood of Painters and Allied Trades, Local 1795 Glaziers (Applicant) v. Felice Aluminum and Glass Ltd. (Respondent) (*Granted*)

2552-92-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Dover Elevator Corporation (Respondent) (*Withdrawn*)

2554-92-G: Labourers' International Union of North America, Local 1059 (Applicant) v. TCG Materials Limited (Respondent) (*Withdrawn*)

2558-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Dufresne Piling Company (1967) Ltd. (Respondent) (*Withdrawn*)

2568-92-G: Labourers' International Union of North America, Local 837 (Applicant) v. Shadeland Masonry Ltd. (Respondent) (*Granted*)

2573-92-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Pace Construction Company Limited (Respondent) (*Withdrawn*)

2576-92-G: The Ontario Allied Construction Trades Council and Labourers' International Union of North America, Local 1089 (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

2594-92-G: Labourers' International Union of North America, Local 506 (Applicant) v. Formcrete Contracting Ltd. (Respondent) (*Granted*)

2599-92-G: Marble, Tile & Terrazzo Union - Locals 31 and 4 of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. A 1 Floor & Wall Covering Inc. (Respondent) (*Granted*)

2600-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Doorcraft Ltd. (Respondent) (*Withdrawn*)

2609-92-G: International Union of Operating Engineers and its Local 793 (Applicant) v. Premier Murphy Pipelines (Respondent) (*Withdrawn*)

2624-92-G: Labourers' International Union of North America, Local 1059 (Applicant) v. G.L. Robbins Construction Ltd. (Respondent) (*Withdrawn*)

2627-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Antinori Inc. (Respondent) (*Withdrawn*)

2628-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. All Systems Scaffolding Inc. (Respondent) (*Withdrawn*)

2629-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Southern Renovations (Respondent) (*Withdrawn*)

2630-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Caulking By Melas Limited (Respondent) (*Withdrawn*)

2631-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Verastar Forming Ltd. (Respondent) (*Withdrawn*)

2645-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. S C Construction Ltd. (Respondent) (*Granted*)

2647-92-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. F.A. Coombs Sheet Metal Limited (Respondent) (*Granted*)

2666-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. John W. Baldwin Electric Company Limited (Respondent) (*Withdrawn*)

2669-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. EMC Electric Inc. (Respondent) (*Withdrawn*)

2670-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Macnaughton Electric Company Limited (Respondent) (*Withdrawn*)

2671-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Positive Electric Company Limited (Respondent) (*Granted*)

2672-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. MLS Cable Installation Inc. (Respondent) (*Withdrawn*)

2681-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Fontaine Concrete Ltd. (Respondent) (*Withdrawn*)

2686-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. Javid Construction Management Limited (Respondent) (*Withdrawn*)

2697-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Nick Giamberardino & Brothers Ltd. (Respondent) (*Withdrawn*)

2698-92-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Schindler Corporation (Respondent) (*Withdrawn*)

2712-92-G: Drywall Acoustic Lathing and Insulation, Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gulf Lathing & Drywall Ltd. (Respondent) (*Withdrawn*)

2757-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Building Control Systems (Respondent) (*Withdrawn*)

2764-92-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambareri Construction Inc. (Respondent) (*Granted*)

2765-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Set Construction Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3186-90-U: Bertrand F. Bennett (Complainant) v. United Brewers Warehousing Provincial Board (Respondent) v. Brewers Retail Inc. (Intervener) (*Dismissed*)

1310-91-U: Reuben Gooden (Complainant) v. Howard Kay (Respondent) (*Dismissed*)

2432-91-R: IWA - Canada (Applicant) v. Standard Paper Box Division of SPB Canada Inc. (Respondent) v. The Canadian Paperworkers Union and its Belleville Local 1335 (Intervener) (*Dismissed*)

0486-92-U: Richard A. Posivy (Complainant) v. Canadian Union of Public Employees and Local 11 (Respondent) v. North York Hydro (Intervener) (*Dismissed*)

1995-92-R: The Employees of Grange W. Elliott Ltd., John G. Cooper, Doug L. Hull, Jeff D. Overland, Jeff M. Morrison (Applicants) v. Labourers' International Union of North America, Local 247 (Respondent) (*Dismissed*)

2149-92-R: United Food & Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Applicant) v. 727989 Ontario Limited c.o.b. as Loeb Club Plus Meadowlands (Respondent) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
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ONTARIO LABOUR RELATIONS BOARD REPORTS



February 1993



Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1993] OLRB REP. FEBRUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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CASES REPORTED

1.	Barton Feeders Inc.; Re U.F.C.W., Local 633	89
2.	Canadian Paperworkers Union; Re C.P.U., Local 1199	99
3.	The Carleton Board of Education; Re Carleton Administration Support Certified Employees Association	102
4.	Custom Concrete Northern Ltd.; Re I.U.O.E. and its Local 793	103
5.	Deloitte & Touche; Re C.U.P.E. and its Local 1343	109
6.	Ellis-Don Limited, The Jackson-Lewis Company Limited, Eastern Construction Company Limited and Konvey Construction Limited; Re C.J.A., Local 27, and L.I.U.N.A., Local 183	120
7.	Honeywell Limited; Re I.B.E.W., Local 353	128
8.	Lakeridge Acoustics, Malvern Drywall Systems Ltd. and 950337 Ontario Inc. c.o.b. as; Re Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891	137
9.	Leeds and Grenville County Board of Education; Re O.P.S.T.F.	141
10.	Ombudsman Ontario; Re O.P.E.I.U.	147
11.	Strathroy Middlesex General Hospital; Re Practical Nurses Federation of Ontario	149

COURT PROCEEDINGS

1.	Alpa Wood Mouldings Company, a division of Alpa Lumber Inc.; Re OLRB and Carpenters Allied Workers, Local 27, C.J.A.	154
2.	Sobeys Inc. Re; U.F.C.W., Local 1000A	155

SUBJECT INDEX

- Adjournment - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Sector Determination - Board declining to defer complaint to arbitration proceedings under the agreement between Labourers and Carpenters unions - Board denying request to make determination as to which sector of the construction industry the work in dispute falls into before proceeding with the merits of the jurisdictional dispute - Parties directed to file additional material according to timetable set by the Board
- ELLIS-DON LIMITED, THE JACKSON-LEWIS COMPANY LIMITED, EASTERN CONSTRUCTION COMPANY LIMITED AND KONVEY CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27, AND L.I.U.N.A., LOCAL 183 120
- Bargaining Unit - Certification - Bargaining unit agreed upon by parties including 6 lawyers employed in their professional capacity - Union submitting written declarations demonstrating that majority of professionals affected wishing to be included in bargaining unit with other employees - Board finding it appropriate under subsection 6(4.1) of the *Act* to so include them - Certificate issuing
- OMBUDSMAN ONTARIO; RE O.P.E.I.U. 147
- Bargaining Unit - Certification - Practical Nurses Federation of Ontario seeking to represent bargaining unit composed of all hospital employees employed in nursing capacity as registered and graduate nursing assistants -Board dismissing prior certification application having found proposed unit of all employees employed as registered and graduate nursing assistants inappropriate - Hospital objecting to proceeding on the basis of *res judicata* - Board viewing application as, in essence, request for re-litigation of issues finally determined by the Board between the parties - Application dismissed
- STRATHROY MIDDLESEX GENERAL HOSPITAL; RE PRACTICAL NURSES FEDERATION OF ONTARIO 149
- Certification - Bargaining Unit - Bargaining unit agreed upon by parties including 6 lawyers employed in their professional capacity - Union submitting written declarations demonstrating that majority of professionals affected wishing to be included in bargaining unit with other employees - Board finding it appropriate under subsection 6(4.1) of the *Act* to so include them - Certificate issuing
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- Certification - Bargaining Unit - Practical Nurses Federation of Ontario seeking to represent bargaining unit composed of all hospital employees employed in nursing capacity as registered and graduate nursing assistants -Board dismissing prior certification application having found proposed unit of all employees employed as registered and graduate nursing assistants inappropriate - Hospital objecting to proceeding on the basis of *res judicata* - Board viewing application as, in essence, request for re-litigation of issues finally determined by the Board between the parties - Application dismissed
- STRATHROY MIDDLESEX GENERAL HOSPITAL; RE PRACTICAL NURSES FEDERATION OF ONTARIO 149
- Certification - Dependent Contractor - Construction Industry - Judicial Review - Whether certain individuals or entities properly characterized as “employees” or “dependent contractors”, or as “independent contractors” -Board finding certain entities not dependent on respondent employer and therefore “independent contractors” - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board

II

finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing - Divisional Court dismissing employer's application for judicial review

ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.;
RE OLRB AND CARPENTERS ALLIED WORKERS, LOCAL 27, C.J.A. 154

Certification - Practice and Procedure - OSSTF filing certification application after certification application brought by Employees Association, but asking Board to apply subsection 105(3)(a) of the *Act* and to treat its application as having been made on same date as Association's application - Board viewing subsection 105(3) in light of s.8 of the *Act* as placing greater emphasis on the application that is first in time - Board directing, pursuant to subsection 105(3)(b), that the application filed first should be considered first and that consideration of the subsequently filed application should be postponed pending the disposition of the first

THE CARLETON BOARD OF EDUCATION; RE CARLETON ADMINISTRATION
SUPPORT CERTIFIED EMPLOYEES ASSOCIATION 102

Change in Working Conditions - *School Board and Teachers Collective Negotiations Act* - Unfair Labour Practice - Whether wages and benefits paid to certain employees in bargaining unit constituting contravention of statutory freeze - Board rejecting argument that grievors were statutory form teachers and not occasional teachers within unit applied for - Employer's alteration of those teachers' terms and conditions violating the *Act* - Complaint allowed and compensation ordered

LEEDS AND GRENVILLE COUNTY BOARD OF EDUCATION; RE O.P.S.T.F. 141

Construction Industry - Adjournment - Jurisdictional Dispute - Practice and Procedure - Sector Determination - Board declining to defer complaint to arbitration proceedings under the agreement between Labourers and Carpenters unions - Board denying request to make determination as to which sector of the construction industry the work in dispute falls into before proceeding with the merits of the jurisdictional dispute - Parties directed to file additional material according to timetable set by the Board

ELLIS-DON LIMITED, THE JACKSON-LEWIS COMPANY LIMITED, EASTERN
CONSTRUCTION COMPANY LIMITED AND KONVEY CONSTRUCTION LIMITED;
RE C.J.A., LOCAL 27, AND L.I.U.N.A., LOCAL 183 120

Construction Industry - Certification - Dependent Contractor - Judicial Review - Whether certain individuals or entities properly characterized as "employees" or "dependent contractors", or as "independent contractors" - Board finding certain entities not dependent on respondent employer and therefore "independent contractors" - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing - Divisional Court dismissing employer's application for judicial review

ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.;
RE OLRB AND CARPENTERS ALLIED WORKERS, LOCAL 27, C.J.A. 154

Construction Industry - Construction Industry Grievance - Board concluding that manufacture and supply of concrete from permanent facility is not work covered by Teamsters' and Operating Engineers' Pipeline Agreement - Grievances dismissed

CUSTOM CONCRETE NORTHERN LTD.; RE I.U.O.E. AND ITS LOCAL 793 103

Construction Industry - Construction Industry Grievance - Practice and Procedure - Related Employer - Remedies - Responding parties not filing response to application, nor appearing

at hearing - Board issuing declaration on the basis of material filed by the union indicating related activities under common control - Board's Rule 19 also permitting Board to deem responding parties to have accepted all facts in the application when responding parties do not file responses as required by the Rules - Related employer liable to pay outstanding amounts under settlement and Board order in previous grievance referral - Board allowing grievance alleging failure to make remittances and awarding damages against both responding parties

LAKERIDGE ACOUSTICS, MALVERN DRYWALL SYSTEMS LTD. AND 950337
ONTARIO INC. C.O.B. AS; RE ONTARIO COUNCIL OF THE INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891 137

Construction Industry - Construction Industry Grievance - Union grieving alleged violation of ICI agreement during commissioning phase of EMS and Fire Alarm System at hospital project - Board concluding that commissioning of a system or facility, including the software, is construction work - Any work performed during commissioning phase falling within jurisdiction of IBEW - Grievance allowed

HONEYWELL LIMITED; RE I.B.E.W., LOCAL 353 128

Construction Industry Grievance - Construction Industry - Board concluding that manufacture and supply of concrete from permanent facility is not work covered by Teamsters' and Operating Engineers' Pipeline Agreement - Grievances dismissed

CUSTOM CONCRETE NORTHERN LTD.; RE I.U.O.E. AND ITS LOCAL 793 103

Construction Industry Grievance - Construction Industry - Practice and Procedure - Related Employer - Remedies - Responding parties not filing response to application, nor appearing at hearing - Board issuing declaration on the basis of material filed by the union indicating related activities under common control - Board's Rule 19 also permitting Board to deem responding parties to have accepted all facts in the application when responding parties do not file responses as required by the Rules - Related employer liable to pay outstanding amounts under settlement and Board order in previous grievance referral - Board allowing grievance alleging failure to make remittances and awarding damages against both responding parties

LAKERIDGE ACOUSTICS, MALVERN DRYWALL SYSTEMS LTD. AND 950337
ONTARIO INC. C.O.B. AS; RE ONTARIO COUNCIL OF THE INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891 137

Construction Industry Grievance - Construction Industry - Union grieving alleged violation of ICI agreement during commissioning phase of EMS and Fire Alarm System at hospital project - Board concluding that commissioning of a system or facility, including the software, is construction work - Any work performed during commissioning phase falling within jurisdiction of IBEW - Grievance allowed

HONEYWELL LIMITED; RE I.B.E.W., LOCAL 353 128

Dependent Contractor - Certification - Construction Industry - Judicial Review - Whether certain individuals or entities properly characterized as "employees" or "dependent contracts", or as "independent contractors" - Board finding certain entities not dependent on respondent employer and therefore "independent contractors" - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing - Divisional Court dismissing employer's application for judicial review

ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.;
RE OLRB AND CARPENTERS ALLIED WORKERS, LOCAL 27, C.J.A. 154

IV

Discharge - Discharge for Union Activity - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Remedies - Board finding lay-offs partly or wholly motivated by anti-union sentiment and that Act violated when employer threatened to close plant if union came in -Complaint allowed - Reinstatement with compensation ordered - Employer also directed to mail Board notices to bargaining unit members at their homes BARTON FEEDERS INC.; RE U.F.C.W., LOCAL 633	89
Discharge - Intimidation and Coercion - Judicial Review - Unfair Labour Practice - Stay - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Motions judge staying Board's decision - Order of motions judge set aside by 3-judge panel of Divisional Court on basis that judge applied wrong test on a stay and on basis of certain factual errors in her decision - Divisional Court holding that strong <i>prima facie</i> case that decision patently unreasonable must be made out before a stay should be granted SOBEYS INC. RE; U.F.C.W., LOCAL 1000A.....	155
Discharge for Union Activity - Discharge - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Remedies - Board finding lay-offs partly or wholly motivated by anti-union sentiment and that Act violated when employer threatened to close plant if union came in -Complaint allowed - Reinstatement with compensation ordered - Employer also directed to mail Board notices to bargaining unit members at their homes BARTON FEEDERS INC.; RE U.F.C.W., LOCAL 633	89
Interference in Trade Unions - Discharge - Discharge for Union Activity - Intimidation and Coercion - Unfair Labour Practice - Remedies - Board finding lay-offs partly or wholly motivated by anti-union sentiment and that Act violated when employer threatened to close plant if union came in -Complaint allowed - Reinstatement with compensation ordered - Employer also directed to mail Board notices to bargaining unit members at their homes BARTON FEEDERS INC.; RE U.F.C.W., LOCAL 633	89
Intimidation and Coercion - Discharge - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Remedies - Board finding lay-offs partly or wholly motivated by anti-union sentiment and that Act violated when employer threatened to close plant if union came in -Complaint allowed - Reinstatement with compensation ordered - Employer also directed to mail Board notices to bargaining unit members at their homes BARTON FEEDERS INC.; RE U.F.C.W., LOCAL 633	89
Intimidation and Coercion - Judicial Review - Discharge - Unfair Labour Practice - Stay - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Motions judge staying Board's decision - Order of motions judge set aside by 3-judge panel of Divisional Court on basis that judge applied wrong test on a stay and on basis of certain factual errors in her decision - Divisional Court holding that strong <i>prima facie</i> case that decision patently unreasonable must be made out before a stay should be granted SOBEYS INC. RE; U.F.C.W., LOCAL 1000A.....	155

Judicial Review - Certification - Dependent Contractor - Construction Industry - Whether certain individuals or entities properly characterized as “employees” or “dependent contractors”, or as “independent contractors” - Board finding certain entities not dependent on respondent employer and therefore “independent contractors” - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the <i>Act</i> - Certificates issuing - Divisional Court dismissing employer’s application for judicial review	
ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.; RE OLRB AND CARPENTERS ALLIED WORKERS, LOCAL 27, C.J.A.	154
Judicial Review - Discharge - Intimidation and Coercion - Unfair Labour Practice - Stay - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board’s decision and seeking interim relief - Motions judge staying Board’s decision - Order of motions judge set aside by 3-judge panel of Divisional Court on basis that judge applied wrong test on a stay and on basis of certain factual errors in her decision - Divisional Court holding that strong <i>prima facie</i> case that decision patently unreasonable must be made out before a stay should be granted	
SOBEYS INC. RE; U.F.C.W., LOCAL 1000A.....	155
Jurisdictional Dispute - Adjournment - Construction Industry - Practice and Procedure - Sector Determination - Board declining to defer complaint to arbitration proceedings under the agreement between Labourers and Carpenters unions - Board denying request to make determination as to which sector of the construction industry the work in dispute falls into before proceeding with the merits of the jurisdictional dispute - Parties directed to file additional material according to timetable set by the Board	
ELLIS-DON LIMITED, THE JACKSON-LEWIS COMPANY LIMITED, EASTERN CONSTRUCTION COMPANY LIMITED AND KONVEY CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27, AND L.I.U.N.A., LOCAL 183	120
Practice and Procedure - Adjournment - Construction Industry - Jurisdictional Dispute - Sector Determination - Board declining to defer complaint to arbitration proceedings under the agreement between Labourers and Carpenters unions - Board denying request to make determination as to which sector of the construction industry the work in dispute falls into before proceeding with the merits of the jurisdictional dispute - Parties directed to file additional material according to timetable set by the Board	
ELLIS-DON LIMITED, THE JACKSON-LEWIS COMPANY LIMITED, EASTERN CONSTRUCTION COMPANY LIMITED AND KONVEY CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27, AND L.I.U.N.A., LOCAL 183	120
Practice and Procedure - Certification - OSSTF filing certification application after certification application brought by Employees Association, but asking Board to apply subsection 105(3)(a) of the <i>Act</i> and to treat its application as having been made on same date as Association’s application - Board viewing subsection 105(3) in light of s.8 of the <i>Act</i> as placing greater emphasis on the application that is first in time - Board directing, pursuant to subsection 105(3)(b), that the application filed first should be considered first and that consid-	

eration of the subsequently filed application should be postponed pending the disposition of the first

THE CARLETON BOARD OF EDUCATION; RE CARLETON ADMINISTRATION
SUPPORT CERTIFIED EMPLOYEES ASSOCIATION

102

Practice and Procedure - Construction Industry - Construction Industry Grievance - Related Employer - Remedies - Responding parties not filing response to application, nor appearing at hearing - Board issuing declaration on the basis of material filed by the union indicating related activities under common control - Board's Rule 19 also permitting Board to deem responding parties to have accepted all facts in the application when responding parties do not file responses as required by the Rules - Related employer liable to pay outstanding amounts under settlement and Board order in previous grievance referral - Board allowing grievance alleging failure to make remittances and awarding damages against both responding parties

LAKERIDGE ACOUSTICS, MALVERN DRYWALL SYSTEMS LTD. AND 950337
ONTARIO INC. C.O.B. AS; RE ONTARIO COUNCIL OF THE INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891

137

Related Employer - Construction Industry - Construction Industry Grievance - Practice and Procedure - Remedies - Responding parties not filing response to application, nor appearing at hearing - Board issuing declaration on the basis of material filed by the union indicating related activities under common control - Board's Rule 19 also permitting Board to deem responding parties to have accepted all facts in the application when responding parties do not file responses as required by the Rules - Related employer liable to pay outstanding amounts under settlement and Board order in previous grievance referral - Board allowing grievance alleging failure to make remittances and awarding damages against both responding parties

LAKERIDGE ACOUSTICS, MALVERN DRYWALL SYSTEMS LTD. AND 950337
ONTARIO INC. C.O.B. AS; RE ONTARIO COUNCIL OF THE INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891

137

Remedies - Construction Industry - Construction Industry Grievance - Practice and Procedure - Related Employer - Responding parties not filing response to application, nor appearing at hearing - Board issuing declaration on the basis of material filed by the union indicating related activities under common control - Board's Rule 19 also permitting Board to deem responding parties to have accepted all facts in the application when responding parties do not file responses as required by the Rules - Related employer liable to pay outstanding amounts under settlement and Board order in previous grievance referral - Board allowing grievance alleging failure to make remittances and awarding damages against both responding parties

LAKERIDGE ACOUSTICS, MALVERN DRYWALL SYSTEMS LTD. AND 950337
ONTARIO INC. C.O.B. AS; RE ONTARIO COUNCIL OF THE INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891

137

Remedies - Discharge - Discharge for Union Activity - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Board finding lay-offs partly or wholly motivated by anti-union sentiment and that Act violated when employer threatened to close plant if union came in - Complaint allowed - Reinstatement with compensation ordered - Employer also directed to mail Board notices to bargaining unit members at their homes

BARTON FEEDERS INC.; RE U.F.C.W., LOCAL 633

89

Sale of a Business - Unfair Labour Practice - Respondent appointed by Ontario Court (General Division) as receiver and manager of nursing home in December 1991 - Union complaining that respondent failing to adhere to collective agreement between union and nursing home

and refusing to bargain with union - Board finding respondent to be successor employer for purposes of the <i>Act</i> - Board remitting remaining issues to parties for consideration and remaining seized	
DELOITTE & TOUCHE; RE C.U.P.E. AND ITS LOCAL 1343	109
Sector Determination - Adjournment - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board declining to defer complaint to arbitration proceedings under the agreement between Labourers and Carpenters unions - Board denying request to make determination as to which sector of the construction industry the work in dispute falls into before proceeding with the merits of the jurisdictional dispute - Parties directed to file additional material according to timetable set by the Board	
ELLIS-DON LIMITED, THE JACKSON-LEWIS COMPANY LIMITED, EASTERN CONSTRUCTION COMPANY LIMITED AND KONVEY CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27, AND L.I.U.N.A., LOCAL 183	120
<i>School Board and Teachers Collective Negotiations Act</i> - Change in Working Conditions - Unfair Labour Practice - Whether wages and benefits paid to certain employees in bargaining unit constituting contravention of statutory freeze - Board rejecting argument that grievors were statutory form teachers and not occasional teachers within unit applied for - Employer's alteration of those teachers' terms and conditions violating the <i>Act</i> - Complaint allowed and compensation ordered	
LEEDS AND GRENVILLE COUNTY BOARD OF EDUCATION; RE O.P.S.T.F.	141
Stay - Discharge - Intimidation and Coercion - Judicial Review - Unfair Labour Practice - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Motions judge staying Board's decision - Order of motions judge set aside by 3-judge panel of Divisional Court on basis that judge applied wrong test on a stay and on basis of certain factual errors in her decision - Divisional Court holding that strong <i>prima facie</i> case that decision patently unreasonable must be made out before a stay should be granted	
SOBEYS INC. RE; U.F.C.W., LOCAL 1000A	155
Trusteeship - Canadian Paperworkers Union seeking consent under s.84 of the <i>Act</i> to continue its supervision or control with respect to 4 local unions for further period of 12 months - Board satisfied that it has jurisdiction under s.84 where locals under trusteeship no longer hold bargaining rights - Dispute over disposition of assets held by four local unions and issue of validity of trusteeship, including whether trusteeship imposed in bad faith or contrary to union constitution, is one to be resolved by the courts - Board consenting to continuation of trusteeship for 12 months	
CANADIAN PAPERWORKERS UNION; RE C.P.U., LOCAL 1199	99
Unfair Labour Practice - Change in Working Conditions - <i>School Board and Teachers Collective Negotiations Act</i> - Whether wages and benefits paid to certain employees in bargaining unit constituting contravention of statutory freeze - Board rejecting argument that grievors were statutory form teachers and not occasional teachers within unit applied for - Employer's alteration of those teachers' terms and conditions violating the <i>Act</i> - Complaint allowed and compensation ordered	
LEEDS AND GRENVILLE COUNTY BOARD OF EDUCATION; RE O.P.S.T.F.	141
Unfair Labour Practice - Discharge - Discharge for Union Activity - Interference in Trade Unions	

VIII

- Intimidation and Coercion - Remedies - Board finding lay-offs partly or wholly motivated by anti-union sentiment and that Act violated when employer threatened to close plant if union came in - Complaint allowed - Reinstatement with compensation ordered - Employer also directed to mail Board notices to bargaining unit members at their homes	
BARTON FEEDERS INC.; RE U.F.C.W., LOCAL 633	89
Unfair Labour Practice - Discharge - Intimidation and Coercion - Judicial Review - Stay - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Motions judge staying Board's decision - Order of motions judge set aside by 3-judge panel of Divisional Court on basis that judge applied wrong test on a stay and on basis of certain factual errors in her decision - Divisional Court holding that strong <i>prima facie</i> case that decision patently unreasonable must be made out before a stay should be granted	
SOBEYS INC. RE; U.F.C.W., LOCAL 1000A	155
Unfair Labour Practice - Sale of a Business - Respondent appointed by Ontario Court (General Division) as receiver and manager of nursing home in December 1991 - Union complaining that respondent failing to adhere to collective agreement between union and nursing home and refusing to bargain with union - Board finding respondent to be successor employer for purposes of the Act - Board remitting remaining issues to parties for consideration and remaining seized	
DELOITTE & TOUCHE; RE C.U.P.E. AND ITS LOCAL 1343	109

2733-91-U; 4006-91-U United Food and Commercial Workers International Union, Local 633, Complainant v. Barton Feeders Inc., Respondent

Discharge - Discharge for Union Activity - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Remedies - Board finding lay-offs partly or wholly motivated by anti-union sentiment and that Act violated when employer threatened to close plant if union came in - Complaint allowed - Reinstatement with compensation ordered - Employer also directed to mail Board notices to bargaining unit members at their homes

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. A. Correll* and *P. Grasso*.

APPEARANCES: *Michael A. Church*, *Charles William Richardson*, *Leslie Smith*, *Terry Mole* and *Ted Cameron* for the complainant; *B. Litt* and *Patrick Melady* for the respondent.

DECISION OF THE BOARD; February 1, 1993

1. These are two related unfair labour practice complaints dealing with five lay-offs or terminations and a number of statements by the employer alleged to be breaches of sections 3, 65, 67, 71, 81 and 82 of the Act.
2. The hearing of these matters consumed seven days of hearing. Brian Litt, the manager of the respondent's plant in Owen Sound gave evidence for the respondent. Grievors Terry Mole, Leslie Smith, John Van Rooyen, and David Flood gave evidence for the union.
3. The respondent runs a horse meat plant in Owen Sound which is European owned. Brian Litt is its manager, and the senior person in Canada. The number of employees varied but was between 10 and 20 during the period in dispute. It was Mr. Litt's evidence that the business was going from bad to worse during the period of the disputed lay-offs and that was the sole reason for the lay-offs, with the exception of Mr. Van Rooyen, who was terminated for threatening him. It is the union's contention that each of the terminations was motivated by Mr. Litt's reaction to his learning of the union's organizational activities which commenced in October, 1991.
4. This case turns on its facts. The Act and the Board's jurisprudence are clear that the onus of proof is on the employer respondent to demonstrate that its activities were not motivated even in part by anti-union sentiment. We have set out our findings of fact below, and indicated where necessary our resolutions of conflicts in the evidence. In doing so, we have had regard for the demeanour of each of the witnesses, the internal consistency of their evidence, as well as whether it accords with what appears probable in all the circumstances and the relative abilities of each of the witnesses to resist the pull of self-interest in giving their evidence. In this regard, we found the evidence of Mr. Litt to be unreliable in many respects. For instance, and most crucially, Mr. Litt gave several different dates as to when he learned of the union drive, depending on which event he was focused on. He started off saying he first learned of the union on November 19, 1991, then later said he did not learn of it until receiving notice from the Board, which would have been around November 25 or 27. It is clear from his own evidence that he knew at the latest by the time Bill Richardson, the union organizer, called him on November 19, and we have inferred from other events and his lack of consistency that he likely knew much earlier.
5. Contact was made with the union in early October, 1991. There was an organizational meeting on October 7, 1991, a few days after employees had been told that their afternoon break and Christmas bonus would no longer be available as a cost cutting measure.

6. With these general considerations in mind, we will deal with each of the allegations in turn in roughly chronological order.

Terry Mole's Lay-off

7. Terry Mole was laid off with no prior notice on October 23, 1991, together with another employee, Rose Heathers. The general reason given was lack of work. In Mole's case this was said to be because the main type of work he had been doing, referred to as Japanese injection, was declining, and was going to be phased out. He had at that point over four years of uninterrupted service, and had survived lay-offs earlier in the year. It is clear that he was considered a very good employee, as Litt had indicated less than two weeks before Mole's lay-off that if there was an increase in boning work as he hoped, Mole would head up that operation. Although the Japanese injection was phased out in December, 1991, there was still significant work in October. As well, orders were good for hind cuts, and Mole testified that they were quite busy with them just before his lay-off. Other employees were stunned at Mole's lay-off because Litt had "bragged" about Mole's prowess and speed on a number of occasions in the plant, and there were many less skilled people who were not laid off at the time.

8. Litt says he had discussed the possibility of lay-offs with the lead hands in advance, but had not told them he was laying Mole off in advance. Earlier he had said that he would usually tell his lead hands who was going to be laid off before the lay-offs happened.

9. Although having said earlier that the reason for Mole's lay-off was lack of work, Litt said on cross-examination that the suddenness of Mole's lay-off was due to the fact that there was meat missing on October 22 and that he suspected Mole of it. Several months before, Litt had suspected Mole as well as others; a police investigation ensued, but no charges were laid. Litt had never confronted Mole with any of his suspicions, but said this was because he was still trying to gather evidence on his own. There is no evidence corroborative of Litt's on this point. He said he had not even told the lead hands about the missing meat. His suspicions of Mole in October apparently related to his suspicions in March; we have no other evidence linking Mole with any missing meat in October.

10. Mole was one of the people Leslie Smith, the main in-plant organizer, had contacted about the possibility of unionization early on in her process of organizing, which started in the second week of October. When Mole was laid off, he asked Litt if it was because of anything he had done. Litt's response was to the effect that Mole should know that would be against the labour laws. Litt at first did not remember such a response at all, and then gave an unconvincing explanation that he had only made reference to labour laws in the context of requiring a separation slip. We prefer Mole's evidence on this point; his evidence was not subject to the same deficiencies as Litt's.

11. Litt gave Van Rooyen, another grievor, a different explanation of Mole's lay-off shortly thereafter; he said that Mole had had family problems. This apparently referred to a time over a year earlier when Litt had offered Mole leave to deal with a family crisis. At about the same time, Litt asked Van Rooyen if he had ever been a union steward.

12. The day before the lay-off, the other person laid off, Rose Heathers, had been asked if her husband was a union steward. Although her lay-off has not been grieved, this remark at least indicates that by his own admission a union matter was on Litt's mind the day before the lay-off of Mole and Heathers. Litt explains this remark as being related to something his secretary had raised from having played ball with Heathers' husband.

13. A few weeks after Mole's lay-off, Leslie Smith was laid off. Litt came to see her a few days later. One of the subjects discussed was Mole's lay-off. Smith told Litt that Mole had nothing to do with the organizing campaign and asked him why he did not let Mole go back to work. Her evidence was that his response was that he was still convinced he was an instigator and did not want to have anything to do with him. Litt used the word instigator in his evidence about Mole as well, although he said it referred to his suspicions about theft. We are persuaded that in the context of the conversation with Smith, it was clear that Litt had linked Mole with the union's organizational campaign in his mind. We have no evidence that missing meat was part of that conversation at all.

14. Argument was made that a 28 day delay in filing the complaint about Mole's lay-off indicated it was not a valid complaint. This is not a delay of the magnitude that the Board has ever relied on to deny relief where it is otherwise warranted, and we decline to do so in this case.

15. We find that Mole was laid off in contravention of the Act. Although the business was having ongoing problems, there was no specific event that would explain Mole's lay-off without notice shortly after Litt had anticipated that he might be heading up the potentially expanded boning operation. As well, on October 15, a fax from Belgium had suggested alternate crews rather than lay-offs as a means for dealing with the continued difficulties the business was experiencing. The fax had indicated that it was the owners' wish to keep everyone working. Mole's evidence as to his superior versatility to other workers with less experience who were retained was not seriously contested. If Litt had been genuinely concerned about Mole's honesty, it is improbable that he would have been contemplating giving him additional responsibility a short time before the lay-off. We are unpersuaded that the swiftness with which his lay-off followed the initial organizing activity in the plant was a coincidence. The fact that Litt gave several different reasons for Mole's lay-off also detracts from the overall credibility of his explanation of the lay-off.

Leslie Smith's and Daniel Fairbairn's Lay-offs

16. Leslie Smith was laid off on November 18, 1991. She was the key in-plant organizer, having contacted the union and collected membership evidence in the certification drive. November 18 had been a normal day at work for Smith. However, at the end of the day, she had spoken to an employee, who later appeared at the certification hearing in opposition to the union, about signing a card. She had left this employee for last because she was unsure of his sympathies, but had decided that he had the right to have his say. During the course of the conversation he asked about Dan Fairbairn's views. Smith told him that he did not have to worry about Fairbairn, attempting to communicate that the employee should decide for himself. Later in the conversation she had cause to believe that he had taken it otherwise, and tried to clarify that Fairbairn was not an organizer of the union, and that people's wishes were to be confidential. The employee said he would think about it, and took a blank union card from Smith.

17. Having finished the conversation with this employee, Smith went home. Within a very short time of reaching home, Smith received a call from Fairbairn saying he had been laid off. This was shocking news to Smith, since Fairbairn was a long service employee with a good reputation. Within minutes of hanging up from talking with Fairbairn, Smith received a call from Litt who laid her off as well. He told her they were "going down" and that there was all kinds of meat missing. He hung up and called back moments later to ask if she had taken any meat. The next morning Litt told Van Rooyen that Smith was the scum of the earth and that she had stolen meat.

18. Smith asked her lead hand about the missing meat Litt had referred to. He told her there had been none missing for months except from the airport, and that he knew nothing about her lay-off before it happened. Smith had taken some meat from the plant in March, 1991, relying

on other occasions when Litt had given her permission to do so, since he was unavailable to ask at the time. When Litt made an issue of missing meat around the same time Smith went to Litt, despite her lead hand's advice not to, explained that he had been busy at the time, and that she had not gotten back to ask him. She returned the meat; Litt took no action against her. The matter of missing meat had not been mentioned at all to her in the eight months between March and her lay-off.

19. When Smith went to the plant to get her separation slip, Litt asked her how she could sleep at night putting fellow employees out of work like this. Litt denies making this remark, but we prefer Smith's evidence which was given in a very credible manner. In context, it is clear Litt's remark referred to the union campaign. An argument ensued after which Smith left the plant.

20. The following Saturday, Litt acknowledges he called Smith and asked if he could come talk to her. He came to her house and explained to her why he was afraid of having a union come in - that he thought the plant would close. He referred to Terry Mole as an instigator and said he could not tolerate that sort of employee. Litt told Smith that if the vacuum packed meat work picked up she could return to work. Smith "went to bat for" Fairbairn, trying to convince Litt to rehire him.

21. In his testimony, Litt said that Smith was laid off for lack of work. Although Smith was a versatile worker, she had specialized in "blood work" earlier and that had been phased out. Then she had done the Japanese meat work which was being phased out. Litt said he had received a phone call from Belgium which caused him to lay her off on that particular day. It was Smith's evidence that there was plenty of work in the plant at the time.

22. Smith also testified that the manner in which she was laid off in November differed dramatically in tone and notice from the way she had been laid off in June for lack of work. In June, Litt gave notice of the impending lay-off and asked if there were any volunteers. Only after that had he designated individuals to be laid off. He had apologized to her profusely at the time, complimenting her as a worker and saying the lay-off had simply become necessary. By contrast, in November, she had no notice, and his tone was glacial.

23. Smith is said to not have been sufficiently versatile to be reassigned. The employer argues that the fact that Litt later offered her the potential of return to work if more volume returned after she had said she was central to the organizing campaign should be seen as evidence of the lack of anti-union motivation in this case. Further, the employer's alternative argument is that even if Smith had been retained until the end of the Japanese injection in December, she would have been laid off directly after that.

24. Litt said Fairbairn was laid off for lack of work, and because he was not as versatile as other workers. Litt acknowledged on cross-examination that there were workers junior to Fairbairn with similar skills who were not laid off, but said Fairbairn was getting slow. He told Van Rooyen the day following the lay-off that it was because Fairbairn was too short that he was laid off. Van Rooyen testified that Fairbairn, who had over 15 years of experience with the company was not too short to do the job, and David Flood, another grievor, testified that he was quite fast. We have no evidence that Litt had raised any of these issues with Fairbairn or anyone else prior to his sudden lay-off.

25. After Fairbairn asked Litt for his job back, Litt recalled Fairbairn a few days later. Litt says that Fairbairn explained to him skills he had that he had not known about. As Litt had worked with Fairbairn over the course of more than 15 years, it is difficult to believe that he did not really

know what the man was capable of. No one else was laid off at the time of Fairbairn's recall, which tends to undercut Litt's testimony that the lay-off had been necessary because of lack of work.

26. The union alleges that Litt made a deal with Fairbairn that if he signed the petition against the union he would be recalled. Fairbairn was not at work when the petition was circulated, but the union alleges that his signature would be likely to be found on the petition submitted against the certification. It is not necessary to deal with this point as the other evidence is quite sufficient to support our conclusions in this matter. Further, it is inappropriate, both on general principles and in light of section 113 [formerly section 111] of the Act, to disclose who did or did not sign for or against the union except where necessary or the person concerned has disclosed it themselves. Fairbairn did not testify, nor do we have any evidence that he otherwise publicly disclosed whether or not he signed the petition.

27. We have no hesitation in finding that both Smith and Fairbairn were laid off in contravention of the Act. Although as above, we accept that the company was having financial difficulties, the timing of the above sequence of events, together with the remarks made by Litt, make it highly improbable that Smith's union activities and Litt's perception of Fairbairn's did not play a major part in their lay-off at that time. There was no cogent explanation for the timing of these lay-offs. In light of the onus of proof and Litt's overall credibility, it is difficult to believe that the news of Fairbairn and Smith having been related to the union campaign had not reached Litt's ears and played a part in the motivation for their sudden lay-offs. The statement made to Smith that she might later be recalled, which had not materialized by the time of the hearing is insufficient to outweigh the above considerations.

November 19

28. On November 19 several things happened at the plant. John Van Rooyen was laid off. Litt made remarks to employees throughout the plant about the union and he received a call from Bill Richardson, the union's business agent telling him that the union was organizing in the plant.

29. Van Rooyen's lay-off is defended on the basis that Van Rooyen agreed to it, or quit. The night before this lay-off Van Rooyen had been called at home for the first time in his employment history and told he might have to be laid off. Shortly before Mole's and Heather's lay-off, discussed above, Litt asked Van Rooyen if he had been a union steward to which he had responded in the affirmative. On the day of Van Rooyen's lay-off, Litt approached Van Rooyen; a conversation ensued. Litt's and Van Rooyen's evidence differ somewhat, although the general parameters of the discussion are agreed. We prefer the evidence of Van Rooyen where it conflicts with that of Litt. It is clear that Litt was in an upset state that day, and we are not persuaded that his memory of the details is particularly clear. Litt told Van Rooyen he had heard that he had been at an organizing meeting with union lawyers. Van Rooyen told him his informants were wrong, but that he had supported the union. Litt told him he could not understand where his loyalty lay.

30. By the end of the discussion, Van Rooyen was convinced he was being laid off, and left the plant. It was Litt's evidence that this conversation with Van Rooyen was the first he had heard of the union, but we prefer Van Rooyen's evidence that Litt raised the issue of the union with him. We have concluded Litt knew about union activity before this conversation, as is evident from our conclusions about the Mole, Smith and Fairbairn lay-offs. We are persuaded that the motivation for the phone call to Van Rooyen the night before and the conversation the following morning was Litt's upset at the idea of union activity. Even if Van Rooyen "agreed" with the lay-off, it was clearly only because of the pressure from Litt, and Litt's new found lack of trust in him, which we find had its source in the news of union activity. Not long before this, Litt had demonstrated sufficient confidence in Van Rooyen to suggest he head up the Japanese meat section, which Van

Rooyen declined because he was hoping to find other work. However he had not been able to get other work; we are satisfied that at the time of the November 19 lay-off, Van Rooyen did not plan to quit or independently wish to be laid off. We will deal with this further below.

31. Later on November 19, Litt made it clear to employees throughout the plant that he was very unhappy a union was being considered, and let all the employees know that he thought the plant would close if a union came in. Litt acknowledged most of these events, with some slight qualifications on some of the finer points. He testified that he felt betrayed by the idea that someone would organize a union in the plant, that they would be disrespectful to the company and make trouble. Litt acknowledged he told the employees that Belgium would take a dim view of unionization and that it was up to the employees to choose in such hard economic times. Litt also told a story about an employee of his brother-in-law's who had stabbed him in the back after he had tried to help her, which some employees concluded was a thinly veiled reference to Leslie Smith. She had had some medical problems which Litt had treated sympathetically, to the knowledge of other employees, and had then contacted the union.

32. Litt said his comments about the union were in response to a phone call from the union, about which more will be said later. However, we are convinced he was confused about the sequence for a number of reasons. Firstly, we are persuaded that he was already upset about the union the night before and during the conversation of that morning with Van Rooyen. Secondly, it seems a reasonable inference that Richardson called when he did in response to the activities of Litt in the lunchroom, rather than vice versa. Flood testified that Litt came screaming through the plant asking everyone if they had signed a union card and saying that if the union got in the plant would close and said he would find a lawyer to tell him how to legally be an "asshole" to anyone who signed a card. Whether one accepts Litt's milder version of events or Flood's more dramatic one, it is clear that Litt was threatening employees as to the loss of their jobs if they exercised their rights under the Act. This is clearly illegal.

33. Given the above findings we find it unnecessary to make a finding on whether or not Litt was responsible for the posting of the article on the bulletin board highlighting the closure of a unionized plant.

34. Later on November 19, Van Rooyen came back to get his separation slip. He passed Litt on the phone. Litt, in an agitated state, tried to give Van Rooyen the phone, saying, "Here, it's Bill Richardson [the name of the union's business agent], you talk to him." Van Rooyen told Litt he did not know the man.

November 20 to December 31

35. On November 20, a vote was held in the plant by a number of employees. The ballots from this vote were later submitted to the Board as a petition in opposition to the certification of the union. Grievor David Flood testified that his lead hand had called him on the evening of the November 19 to ask him to do this petition. The Board, differently constituted in part, dealt with this petition in a decision dated January 28, 1992 declining to rely on it.

36. On November 21, Litt phoned Van Rooyen and asked him to return to work. Van Rooyen asked him if he would harass him and Litt said he would not. Van Rooyen returned to work a few days later. This is also the date that the first complaint in this matter was filed, although it is not clear if Litt had notice of it at that point. On November 22, 1991, the green sheets from the Board, giving notice of the application for certification, were posted.

37. Sometime in November, the evidence is not certain on what date, Litt was interviewed

on a local radio station and said on air that Belgium would likely close the doors of the plant if it were unionized.

38. On December 4, 1991 the Board received the ballots from the vote. Based on all the evidence before us, it would not appear that all the employees who signed a ballot were at work on November 20, the date when all of the ballots were said to have been collected.

39. On December 15, 1991, the Japanese meat injection processing was stopped.

Van Rooyen's termination

40. On January 7, 1992, a hearing was held on the application for certification. The following morning, Mr. Litt spoke to David Flood about it. He communicated his disenchantment with the Board, who had ruled that the petition would not be relied on to have a representation vote. Litt told Flood he knew that there were four "yes" votes still in the plant, referring to the fact that it had become clear at the hearing that four employees had not signed the petition. Flood and Van Rooyen testified that Litt said he would make it miserable for those four. The next four people laid off are said to be the four who did not sign the petition. Litt says this had nothing to do with it; things were merely getting worse in the business. He says three were laid off for lack of work and Van Rooyen was fired for cause because he threatened him with a knife.

41. During the month of January, as well as earlier, Litt says he was trying to get productivity improvements in the plant because of pressure from the European owners. He says that the interactions which the union labels harassment had to do with his effort to get figures on productivity and to identify who were the most efficient workers. For Litt, the exchange which resulted in Van Rooyen's termination was but one example of his uncooperativeness.

42. On January 20, 1992, Litt asked Van Rooyen several times how long it would take him to bone a hind. Van Rooyen answered that he did not know - that there were a lot of variables and that he did not time himself. This was not an acceptable answer to Litt, who kept asking. Van Rooyen finally said about 15 minutes. Van Rooyen found this interaction to be further evidence of what he found to be a completely changed relationship with Litt after he came back from the certification hearing.

43. It is unnecessary to set out all the details of the final exchange between Litt and Van Rooyen. We prefer Van Rooyen's evidence of it. He gave his evidence very candidly, and did not leave out portions uncomplimentary to himself. Litt's account of Van Rooyen's threatening him with a knife is less credible in all the circumstances. We find that Litt and Van Rooyen had a tense exchange, that Van Rooyen asked Litt to back up so he would not get hurt, not as a threat, but as a precaution, since he felt he had to keep working with the knives while Litt asked him questions, given Litt's attitude at the time. Litt's behaviour during the whole transaction was provocative, for example, accusing Van Rooyen of laughing when he had not been. Despite Litt's apology a few moments later and admission that his statement that Van Rooyen was laughing was not truthful, in his evidence Litt made much of Van Rooyen's having called him a liar.

44. It is argued on behalf of the employer that the fact that Van Rooyen returned to work despite the fact that he had told Litt on November 19 that he voted for the union is further evidence of the lack of anti-union sentiment on Litt's part. Alternatively, it is submitted that he would have been gone by March 6, the last day of work for Ian Adamson.

45. Based on the considerations set out earlier, we find that Van Rooyen's initial lay-off was motivated by anti-union sentiment. His recall a few days later was never explained, but it dem-

onstrates that lack of work was not an urgent situation at the time. It does not prove lack of anti-union sentiment in the face of all of the other evidence and does not undo the harmful effect in labour relations terms of the initial lay-off. The above sequence which resulted in Litt's accusation that Van Rooyen threatened him must be viewed in light of Litt's earlier promise to make it miserable for the four remaining "yes" votes, of whom he knew Van Rooyen was one from the conversations in November. On all the evidence before us, we do not accept that Litt's view of the incident was correct. Rather, we find the discharge was in contravention of the Act because it was motivated at least in part by anti-union sentiment. It is extremely likely that, even if Litt thought at the time he had cause to fire Van Rooyen, this conclusion was coloured by his anger at Van Rooyen for having supported the union.

The lay-offs of Flood, Adamson and Cooper

46. About three weeks after Van Rooyen's lay-off, David Flood was laid off. A week after that Ian Adamson was terminated. Another five weeks later Mike Cooper was terminated. None of these men signed the petition against the union. The three were senior to Flarity, the petitioner, who was laid off three weeks after Cooper's termination.

47. These three terminations are challenged as the result of Litt's fulfilling his promise of early January to make things miserable for the remaining union supporters. Flood testified that Litt had been very hard on him for a few weeks after the certification hearing, but that things had improved a few weeks before he was laid off. Flood also said that on the day of Van Rooyen's termination Litt asked him if he read the Bible and referred to a passage in the Bible about traitors. Litt denies this incident occurred. We prefer Flood's evidence on the point.

48. Flood had missed work one day in March 1991. Litt had seen him in an inebriated state the night before and wrote on his time card "dismissed". Before Flood had seen this, he had asked Litt if he still had his job, and Litt said yes. The employer argues that this was a firing and rehiring, and not a continuous employment. However, Flood's seniority on the sheet provided by the employer during negotiations before this point was in issue indicates his date of hire as previous to this incident. The employer says that a decline on the volume of vacuum packed meat caused Flood's lay-off.

49. We have some evidence that Cooper and Adamson were also subject to increased scrutiny, and the union alleges that their terminations in advance of the petitioner Flarity further underscores their allegations about the grievors Flood and Van Rooyen. Flarity had been laid off before and then survived these lay-offs - the reverse of the situation with the grievors. Mole and Van Rooyen had been retained through the June lay-off. Litt said those he recalled in September, which included Smith, Flood, Cooper, Adamson and Flarity, were recalled because they were the best workers. Others who were laid off in June were never recalled.

50. The union did not dispute that times were difficult for Barton Feeders throughout the disputed period. However, it questions the timing of the last three disputed lay-offs. The union observes that despite several threats of plant closure for lack of work, nothing happened after the November lay-offs until after the certification hearing.

51. The employer says that even if seniority had been the governing criterion as the union wishes, all these people would have been laid off. For instance, it is said that Flarity and Adamson would have been gone in the Fall if seniority had been used, rather than the established employer policy that the best workers continue to work at time of lay-off.

52. It was submitted that the fact that the plant has continued despite the lay-offs demon-

strates that they were necessary for economic survival. The lay-offs were described as business as usual in bad economic times. Argument on behalf of the employer stressed that declining volume was the only reason for the lay-offs. As well, it was observed that the employees demonstrated an awareness of the potential for lay-offs with declining work. It was the employer's memo addressing financial problems by cutting breaks and bonus that lead to contact with the union in the first place. It was further submitted by the employer that only four lay-offs would have been done if there had just been a campaign against the union supporters. Six were done and there has been no occasion to rehire since May of 1992.

53. With respect to the last three lay-offs, there is no doubt that the time were troubled for the business and that the three had low seniority. Further, other lay-offs were done subsequently. However, the timing of the lay-offs was not well explained by the respondent. Litt's general assertions that union activity had nothing to do with the lay-offs cannot be given a lot of weight in light of our earlier observations. We have accepted as credible the evidence of Litt's promise that things would be difficult for the four remaining yes votes. The next termination (Van Rooyen) and three lay-offs were those four. Although kill levels were not what they had been in previous times, there were not dramatic decreases that sufficiently explain the lay-offs. The average monthly kill was not generally much lower than before the post-certification promise, in December, when there were no lay-offs.

54. On balance, we find the respondent has not discharged its onus of proof. We are not persuaded that the lay-offs of Flood, Cooper and Adamson were not also tainted by anti-union animus. Thus we find that their lay-offs were also in violation of the Act.

Remedy

55. We have found that all of the grievors were laid off in violation of the Act as their lay-offs were partly or wholly motivated by anti-union sentiment. They are to be reinstated as of the date of their lay-offs. They are all to be compensated, with interest, for their losses due to the unlawful lay-offs. In making this order we are aware that their lay-offs might well have taken place at some subsequent time for legitimate business reasons. We remit the question of whether or not they will actually return to work as well as the issue of quantum of compensation to the parties. We hereby authorize a labour relations officer to confer with the parties to assist them with the resolution of any issues between them on these subjects. We will remain seized if the parties are unable to come to an agreement on the amount of compensation or the question of return to work for the grievors.

56. In the circumstances of the case, we are of the view that the most effective way to bring this decision to the attention of the employees in the bargaining unit is to order the attached notice to be mailed by the respondent to each of the members of the bargaining unit at their home address within fourteen days of the date of this decision. This is in further remedy for the above violations and the violations of threats to the workers' jobs if they exercised their rights under the Act.

57. For all the above reasons the complaints are allowed.

Appendix**The Labour Relations Act****NOTICE TO EMPLOYEES****By Order of the Ontario Labour Relations Board**

We have issued this Notice in compliance with an order of the Ontario Labour Relations Board issued after a hearing in which both the company and the United Food and Commercial Workers International Union, Local 633 had the opportunity to present evidence and argument. The Ontario Labour Relations Board found that we violated the *Labour Relations Act* in respect of the lay-offs of Terry Mole, Leslie Smith, John Van Rooyen, David Flood, Michael Cooper and Ian Adamson. It also found we violated the Act in threatening that the plant would close if the union came in.

The Act gives all employees these rights:

To organize themselves;

To form, join and participate in the lawful activities of a trade union;

To bargain as a group, through a representative of their own choosing;

To act together for collective bargaining;

To refuse to do any or all of these.

Barton Feeders Inc.

Per: (Authorized Representative)

DATED at Toronto this 1st day of February, 1993

3021-91-T; 3022-91-T; 3023-91-T; 3691-91-T Canadian Paperworkers Union, Applicant v. Canadian Paperworkers Union, Local 1199, Respondent; Canadian Paperworkers Union, Applicant v. Canadian Paperworkers Union, Local 309, Respondent; Canadian Paperworkers Union, Applicant v. Canadian Paperworkers Union, Local 934, Respondent; Canadian Paperworkers Union, Applicant v. Canadian Paperworkers Union, Local 1335, Respondent

Trusteeship - Canadian Paperworkers Union seeking consent under s.84 of the Act to continue its supervision or control with respect to 4 local unions for further period of 12 months - Board satisfied that it has jurisdiction under s.84 where locals under trusteeship no longer hold bargaining rights - Dispute over disposition of assets held by four local unions and issue of validity of trusteeship, including whether trusteeship imposed in bad faith or contrary to union constitution, is one to be resolved by the courts - Board consenting to continuation of trusteeship for 12 months

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. N. Fraser* and *K. Davies*.

APPEARANCES: *J. James Nyman* and *Andre Foucault* for the applicant; *Frederick Caplan* and *Gary Buccella* for the respondents.

DECISION OF THE BOARD; February 1, 1993

1. These are four applications by the Canadian Paperworkers Union ("CPU") seeking consent of the Board to continue its supervision or control with respect to four local unions for a further period of twelve months.

2. Section 84 of the Act provides as follows:

84. (1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within sixty days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.

(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than twelve months from the date of such assumption, but such supervision or control may be continued for a further period of twelve months with the consent of the Board.

3. In the *Operative Plasterers and Cement Masons International Association of the U.S. & Canada*, [1978] OLRB Rep. March 223, the Board made the following comments concerning the general purpose and operation of section 84:

10. Section 73(1) [now 84(1)] requires that when a trade union places a subordinate local under trusteeship (using that term to refer to all manner of supervision and control) it must file certain information concerning the trusteeship with the Board. The Act, however, places no impediments or constraints on a union when it places a local under trusteeship. This lack of impediments or constraints would appear to reflect a recognition on the part of the Legislature that most trusteeships are imposed as a result of real and legitimate concerns on the part of the union involved. For example, a trusteeship may be imposed because of mismanagement or dishonest use of local funds, because a local has become so torn by dissent that it cannot function properly, or perhaps to remove officers who have either become dictatorial or who have failed to

administer the local in a responsible manner. At times, particularly with small locals, a trusteeship may be imposed simply because none of the members of the local are willing to assume the responsibilities of elected office.

11. The Legislation recognizes that trusteeships generally have a legitimate purpose, but it also places restrictions on their duration. Trusteeship is inevitably accompanied by a restriction on the ability of the local's membership to participate in the government of the local or to have a say in the policies adopted by the local. The longer the trusteeship is allowed to continue the more serious will become the resulting denial of self-government and the greater will the likelihood that the policies and practices adopted by the local will not be reflective of the wishes of the local's membership.

12. In essence then, section 73 [now 84] appears to be an attempt by the Legislature to balance the legitimate interests of a union which may require the suspension of a local's autonomy against the desirability of local self-government through officers elected by, and responsible to, the local membership. The section allows a full twelve months in which a union can resolve the problems which led to the trusteeship being imposed. The very existence of such a time limit should prompt responsible union officials to move with reasonable dispatch to correct the problems which led to the imposition of trusteeship. The section, however, also makes allowance for the fact that not every problem which leads to a trusteeship being imposed may be able to be resolved in 12 months, and thus some flexibility has been provided by stipulating that trusteeships can be continued for a further period of 12 months with the consent of the Board. Because of the Act's obvious concern with the length of trusteeships, the most reasonable interpretation of the section is not that a trusteeship must be extended for a further 12 month period in every case, but rather that it can be extended for any period of time up to 12 months. This is clearly the view which was adopted by the Board in *The United Brotherhood of Carpenters and Joiners of America* case, [1972] OLRB Rep. Sept. 833 where just prior to the expiration of the first 12 months of a trusteeship the Board agreed to the continuation of the trusteeship until such time as it issued a further decision in the matter. Approximately 4 months later the Board issued a second decision wherein it refused to grant its consent to any further continuation of the trusteeship.

4. The CPU complied with its obligations under section 84(1) which caused the Board to open the above-referenced files in 1991. A trusteeship was imposed on Locals 1199, 934 and 309 on October 21, 1991 and on Local 1335 on December 18, 1991. The above files were activated when the CPU made its requests to continue each of these trusteeships.

5. A hearing before the present panel with respect to these applications commenced on January 5, 1993. After counsel for each party made a detailed opening statement, it appeared clear that there were many facts which were not in dispute. It was also clear that there were a number of facts relied upon by the respondents which were disputed by the CPU. Without hearing any oral evidence, the Board called upon the parties to make their submissions having regard to the facts which were not in dispute, and assuming the facts relied upon by the respondents which were in dispute to be true. At the end of the hearing on January 5, the Board advised the parties that it would reserve its decision. If the Board was able to dispose of the case on this basis, it would of course do so. The Board also advised the parties though that if it was unable to decide the matter without having to resolve the facts in dispute, these applications would continue on the two remaining days already scheduled for the purpose of hearing evidence and further argument from the parties.

6. Having reviewed the material before it and the parties' submissions, the Board finds that it is in a position to dispose of these applications.

7. The relevant undisputed facts can be set out briefly. After the trusteeships were imposed on each of the Locals, the trustee attempted unsuccessfully to secure the assets and property of each Local. The dispute between the parties has made its way into the courts. We do not

propose to detail the court proceedings but simply note that the respondents are challenging the validity of the trusteeship, and are seeking an accounting and return of the money while the CPU is attempting to secure assets and seeking damages. By the date of the hearing, the trustee had still been unable to secure all of the assets of each Local union. Counsel for the respondents made it very clear that even if the Board were to continue the trusteeship, the respondents would not cooperate by providing the trustee with what he wanted. By the time of the hearing, each of the four CPU Locals had lost its bargaining rights, either by means of a termination application or by means of an application for certification. The CPU argues that the Board should consent to a continuation of the trusteeship for a further twelve months in order to permit the trustee to complete his functions.

8. As noted earlier, the respondents rely on a number of facts which are disputed by the CPU. The respondents contend that the CPU imposed a trusteeship in bad faith and in a way that was contrary to the terms of the CPU Constitution. The respondents refer to Article 10, Section 8 of the CPU Constitution which provides that the assets of the local union are the exclusive property of the local union and its membership and may be only disposed of by a majority vote of the total membership. The respondents also refer to the various votes held by the membership with respect to the disposition of the assets. The respondents contend that there is no valid reason for continuing the trusteeship and they also contend that the sole reason why the CPU wishes the trusteeship to continue is simply to further delay the return to its former members of the assets which rightfully belong to them. The respondents contend that a continuation of the trusteeship may prejudice their efforts in the courts since a court may be unduly affected by the Board's granting its consent to continue the trusteeship. Apart from the merits of the application, counsel for the respondents argued that the Board did not have jurisdiction under section 84 since section 84 was intended to deal with trusteeships in the context of collective bargaining relationships, and since there is no collective bargaining relationship to be concerned with here, section 84 was not designed to deal with this situation.

9. As the quotation from the *Operative Plasterers* decision referred to earlier makes clear, section 84 of the Act is intended to deal with more than simply the imposition of trusteeships within a collective bargaining context. The wording of the provision contains no such limitation. Section 84 of the Act is one of the few provisions in the Act which impact on internal union affairs. The Board is satisfied that it does have jurisdiction under section 84 in circumstances where the locals placed under trusteeship no longer hold bargaining rights.

10. Even if we assume all the facts relied upon by the respondents to be true, the Board is satisfied in the circumstances that it is appropriate to allow these applications by the CPU. The trustee has been unable to complete his functions and this has been the case primarily because of the desire of the respondents to frustrate his efforts. We also fail to see any prejudice to the respondents by consenting to the continuation of the trusteeship. The Locals no longer hold bargaining rights and arguably have no members. There is obviously a dispute between the parties concerning the disposition of the assets held by the four Local unions. The resolution of this dispute is clearly something that will have to be resolved by the courts. The issue of the validity of the trusteeship will ultimately have to be determined as well by the courts, and we wish to make it clear in this decision that we have not made a determination with respect to whether the trusteeship was imposed in bad faith or contrary to the terms of the CPU Constitution. In weighing the various interests involved, the Board is satisfied that it is appropriate to allow these applications.

11. Having regard to the foregoing, the Board, pursuant to the exercise of its discretion under section 84(2), consents to the continuation of the supervision or control by the Canadian Paperworkers Union over the Canadian Paperworkers Union, Locals 1199, 934, and 309 for a fur-

ther period of one year from October 21, 1992, and over Canadian Paperworkers Union, Local 1335 for a further period of one year from December 18, 1992.

2. The Registrar is directed to cancel the March 29, 1993 and April 2, 1993 hearing dates.
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3015-92-R; 3058-92-R Carleton Administration Support Certified Employees Association, Applicant v. **The Carleton Board of Education**, Responding Party; Ontario Secondary School Teachers' Federation, Applicant v. Carleton Board of Education, Responding Party

Certification - Practice and Procedure - OSSTF filing certification application after certification application brought by Employees Association, but asking Board to apply subsection 105(3)(a) of the Act and to treat its application as having been made on same date as Association's application - Board viewing subsection 105(3) in light of s.8 of the Act as placing greater emphasis on the application that is first in time - Board directing, pursuant to subsection 105(3)(b), that the application filed first should be considered first and that consideration of the subsequently filed application should be postponed pending the disposition of the first

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

DECISION OF THE BOARD; February 9, 1993

1. By decision dated January 29, 1993 the Board requested the submissions of the parties with respect to the appropriate exercise of our discretion under section 105(3) of the *Labour Relations Act* (the "Act") in the circumstances outlined. We have received and reviewed those submissions.

2. The Ontario Secondary School Teachers' Federation ("OSSTF") requests that the Board apply section 105(3)(a) of the Act and treat its application as having been made on the same date as the application filed by the Carleton Administration Support Certified Employees Association (the "Association"), that is, on January 22, 1993. (In the Board's decision of January 29, 1993 the Association's application date was incorrectly identified as January 21, 1993). The OSSTF further argues that the terminal date assigned in each case remain as originally set by the Registrar. The submission from the Association states that Board File Nos. 3015-92-R and 3058-92-R be treated as concurrent applications (as does the OSSTF) but that the OSSTF be assigned the same terminal date as that already fixed in the Association's application. It is the position of the employer that the Board postpone consideration of the OSSTF's application under section 105(3)(b) of the Act. The employer notes that it has filed an application to consolidate bargaining units in respect of the application in Board File No. 3015-92-R and another application brought by the Association in Board File No. 3014-92-R.

3. In the past the Board generally exercised its discretion under section 105(3)(a) of the Act to deal with subsequent applications in circumstances where the later applicant had filed its application before the terminal date of the first application. In that circumstance, the later application would be treated as having been made on the same application date as the first application. Section 105(3) is silent with respect to the terminal date and so various circumstances have influenced the Board in determining an appropriate terminal date for the "joined" applications. The

Board has expressed the view (at least with respect to applications for certification not in the construction industry) that where it was apparent that two bargaining agents were actively soliciting support so close in time that there was some value in hearing those applications together.

4. Prior to the recent changes to the *Labour Relations Act* both the application date and the terminal date were necessary reference points for determining the level of support among employees. However, the terminal date is no longer relevant in determining the level of membership support enjoyed by any applicant for certification. Both the number of employees in the bargaining unit and the level of membership support enjoyed by the trade union among those employees is now determined as of the date of application (see section 8 (1)).

5. *M. Pickard Construction Co. Ltd.*, [1989] OLRB Rep. Oct. 1046 filed by the OSSTF is of little assistance. Its discussion is primarily centered on which terminal date the Board should assign a subsequent application in circumstances where that date was highly relevant to the outcome of an application. While there may well be circumstances where it would be appropriate to utilize the option described in section 105(3)(a), we are of the view that section 105(3) read in light of section 8 of the Act, now places greater emphasis on the application that is first in time. That first applicant must still of course establish that it enjoys the support of the majority of the employees in the bargaining unit. Other interests are protected in that there may well be grounds for another trade union to intervene on behalf of employees in the bargaining unit in respect of a first application. We note that a request to intervene has been filed by the OSSTF in Board File No. 3015-92-R prior to the terminal date of the Association's application.

6. We hereby direct pursuant to section 105(3)(b) of the Act that the consideration of the application for certification filed by the OSSTF in Board File No. 3058-92-R be postponed until a final decision has issued in Board File No. 3014-92-R.

3132-91-G; 3829-91-G International Union of Operating Engineers and its Local 793, Applicant v. **Custom Concrete Northern Ltd.**, Responding Party; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its Local 230, Applicant v. **Custom Concrete Northern Ltd.**, Responding Party

Construction Industry - Construction Industry Grievance - Board concluding that manufacture and supply of concrete from permanent facility is not work covered by Teamsters' and Operating Engineers' Pipeline Agreement - Grievances dismissed

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members R. W. Pirrie and J. Kurchak.

APPEARANCES: N. L. Jesin, R. Kennedy, T. Kelly on behalf of the International Union of Operating Engineers; N. L. Jesin, M. Elliot and J. Burt on behalf of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its Local 230; Carl Peterson, Ray Norris and Dan Bielaski on behalf of the responding party.

DECISION OF VICE-CHAIR, INGE M. STAMP AND BOARD MEMBER R. W. PIRRIE;
February 23, 1993

1. The name of the responding party is amended to read: "Custom Concrete Northern Ltd." For ease of reference we will refer to the responding party as the "company" or "Custom Concrete".

2. These are referrals of grievance to arbitration under section 126, construction industry. The applicants allege the responding party has violated the Mainline Pipeline Agreement. There are two applicants, the International Union of Operating Engineers and its Local 793 ("Operating Engineers") and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its Local 230 ("Teamsters").

3. The applicants take the position that the work that is the subject of the grievances is covered by their collective agreements and in particular by the following Articles:

...

TEAMSTERS MAINLINE PIPELINE AGREEMENT

ARTICLE I

COVERAGE AND DEFINITIONS

"THIS AGREEMENT shall apply to and cover the construction, installation, treating, reconditioning, taking-up, re-bevelling, relaying, relocating, stockpiling, double-jointing or testing of all pipelines or any segments thereof transporting gas, oil, vapours, liquids, slurries, solids, or other transportable materials and underground and marine cables and all work incidental thereto or an integral part thereof coming within the jurisdiction of the Union, contracted for or performed by the Employer within Canada as such work is more fully described below illustrated in the accompanying charts. By mutual agreement this contract by be extended to cover other territory."

...

ARTICLE II

SCOPE OF WORK

...

"E. Where material and equipment is supplied by hauling to the site for any work defined in Article I such hauling shall be done in accordance with this Agreement.

F. This Agreement shall not be construed to include the employees or agents of third parties engaged in the supply or delivery of materials, parts, tools, or supplies to the work covered by this Agreement other than the employees of sub-contractors so engaged.

...

H. All hauling of pipe and stockpiling from the railhead, dockside, mill, owner's permanent yard or yards, or a coating mill, to be used for any work defined in Article I shall be performed under and in accordance with the terms and conditions of this Agreement and Schedule D attached hereto."

...

Schedule D sets out rates and conditions for the hauling of equipment, materials and pipe.

OPERATING ENGINEERS MAINLINE
PIPELINE AGREEMENT FOR CANADA

ARTICLE I

COVERAGE AND DEFINITIONS

“THIS AGREEMENT shall apply to and cover the construction, installation, treating, reconditioning, taking-up, re-bevelling, relaying, relocating, double-jointing, or testing, and stockpiling and stringing of pipe and pipe weights, of all pipelines or any segments thereof including marine pipelines, transporting gas, oil, vapours, liquids, slurries, solids, or other transportable materials and underground and marine cables and all work incidental thereto or an integral part thereof coming within the jurisdiction of the Union, contracted for or performed by the Employer within Canada as such work is more fully described below and illustrated in the accompanying charts. By mutual agreement this contract may be extended to cover other territory.

• • •

ARTICLE IV

JOB NOTIFICATION AND ENFORCEMENT

• • •

B. The Employer and the Local Union shall hold a Pre-job Conference before the start of the job, and the Local Union's representative at such conference shall be authorized by the Local Union to represent the Local Union for the entire area covered by the job within the territorial jurisdiction of the Local Union. The purpose of the Pre-job Conference shall be to define those matters outlined in the Pre-job Conference Report which is attached to this Agreement as Addendum B, but not including the changing of any of the conditions of this Agreement nor any interpretation of any of its clauses; it being agreed that any interpretation of this Agreement shall be made between the prime parties hereto so that proper application thereof may be made on the job. Whenever possible all Pre-job Conferences will be held jointly with the four pipeline crafts.

• • •

D. The Union will send a copy of this Agreement to each of its Local Unions having pipeline jurisdiction and the terms of this Agreement and none other shall be recognized by each Local Union and any Employer engaged in the same or similar work as defined in Article I hereof.”

• • •

4. The work in dispute involves the manufacture and supply of concrete or ready-mix for concrete weights for a pipeline project going through the Cochrane area. Conweigh Incorporated purchased the concrete from Custom to be supplied to various sites. Conweigh manufactured the concrete weights.

5. Custom Concrete purchased land in the Town of Cochrane in March of 1989. The company entered into an agreement with the Corporation of the Town of Cochrane in June of 1989 to install water and sanitary sewer services at the cost of \$73,000.00, \$54,000.00 to be borne by the municipality and \$18,000.00 by Custom Concrete. Plans for the batching plant had been in the works for some time before the pipeline work commenced in November of 1991. The building permit was issued in April 1991. The Public Utilities Commission of Cochrane hooked up Hydro services in May of 1991. The completed structure housed an office, batching plant and a washroom. By comparison the “portable batching plants” were units delivered to the various pipeline job

sites. These portable units did not require building permits or involve the installation of permanent utilities. (See Exhibit 8 and 9)

6. The applicants contend this work is covered whether or not the batching plant is portable or permanent. The applicant further submits the plant at Cochrane was built for the sole purpose of supplying the pipeline project. It is the applicants' view the facility was put up in a few days and can be taken down just as quickly.

7. The applicant refers to Webster's dictionary defining "incidental" as a minor role, not essential. This gives a very broad scope as to what would be covered by a collective agreement i.e. the manufacture and delivery of concrete needed for the manufacture of the weights. The applicants point to the wage schedules which include concrete drivers, (Teamsters) and Group I operators which include loaders and batch plants (Operating Engineers).

8. The applicants submit there is no basis to distinguish between portable or permanent facilities in terms of the applicability of the collective agreement. Whether the work is done in a portable or permanent facility it is the same job function. The applicants request a declaration that both collective agreements have been violated with respect to the work and asks the Board to remain seized on any remedial issues.

9. The applicants submit there was an agreement between the parties to apply the collective agreement not only to the three portable sites but also to the Cochrane facility and that agreement should be enforced by the Board. The applicants submit this agreement is reflected in the four locations identified in the Operating Engineers Pre-job Conference Report. There is no pre-job report for the Teamsters. There were some discussions with the Teamsters representative about applying the agreement to all four locations. Counsel for the applicants submits Exhibit 5, the Operating Engineers Pre-job Conference Report, is binding and enforceable citing *E.S. Fox Limited*, [1992] OLRB Rep. Jan. 29 paragraph 21. The applicant contends the language in Article IV B of the Operating Engineer's agreement supports his position that the Board can enforce this Pre-job Conference Report. Counsel cited *Suss Woodcraft Ltd.*, [1983] OLRB Rep. Apr. 600 which directed the company to comply with an oral settlement.

10. The company submits the work in dispute is not covered by the collective agreement in that it is a permanent facility and/or is not construction work. Custom Concrete submits the applicants are attempting to expand their jurisdiction into an area with wide spread ramifications, namely into "supply". "Supply" is not construction. The company submits other supplies/deliveries are not covered by the Pipeline Agreement such as the delivery of aggregate, cement powder, trailers, fuel, dozers delivered on non-union floats, tools, vibrators. It is the responding party's position that permanent facilities are not covered by the agreement unlike portable units which go from site-to-site.

11. The company contends the Pipeline Agreement by law cannot cover non-construction. The supply of concrete to a site from a permanent manufacturing facility, just like steel, would not be considered construction. A permanent manufacturing facility has never been held to be construction, otherwise the manufacture of asphalt, steel etc. integral to the construction of the Pipeline would be covered by the agreement. Counsel submits the Pipeline Contractors Association does not have the authority or jurisdiction to negotiate a collective agreement outside the Pipeline sector of the construction industry as per its accreditation certificate and the Board's decision of August 10, 1972. Paragraph 4 of that decision states in part:

The applicant, Pipe Line Contractors Association of Canada, is a corporation under Part II of the Canada Corporations Act. Letters Patent were issued by the Minister of Consumer and Cor-

porate Affairs for the Government of Canada to the Pipe Line Contractors Association of Canada on the 9th day of April 1968. On April 26, 1971, the original Letters Patent were amended by Supplementary Letters Patent. As a result of the Supplementary Letters Patent the objects of the applicant corporation included the following:

- (i) to regulate the relations between employers and employees in the pipeline construction industry;
- (ii) to become a representative association and/or a registered or accredited employers' organization where such may be provided for by law and to conduct collective bargaining and to administer collective bargaining agreements on behalf of employers of employees in the pipeline construction industry.

Counsel for the company submits there is no reference to non-construction work in the Mainline Pipeline Agreement or the Voluntary Recognition Agreements. The responding party cited a number of cases which support its position that the work in dispute is not construction. The company submits Exhibit 5 is not a collective agreement and is not enforceable. Article IV of the Operating Engineers Agreement states it cannot change or interpret any clause of the collective agreement. The company submits case law on grievance settlements is not relevant.

Decision

12. The issue is whether the manufacture and supply of concrete from a permanent facility is work covered by the Teamsters' and Operating Engineers' Pipeline Agreement. There is no issue with respect to portable units which are used on site and are covered by the agreements.

13. The Board has reviewed the evidence, the Exhibits and the cases cited. The facility at Cochrane differed substantially from the portables on site. It is a structure which required a building permit and included the installation of permanent utilities on land purchased by the company. Plans had been made for this facility some time before the pipeline project commenced. The decision to build this facility was in anticipation of business opportunities, including the pipeline. During the relevant time the bulk of its product was supplied to the pipeline with the remaining product being delivered to other customers.

14. The Board has dealt with this issue in a number of cases. See, for example, *Maitland Redi-Mix Concrete Products Limited*, [1980] OLRB Rep. Dec. 1751, the Board stated in part:

...

6. The applicant is engaged in the delivery of ready-mix concrete to the site of construction. The Board has determined on many occasions that an employer which merely delivers material to a site of construction is not an employer within the meaning of section 106(c) of the Act. See, for example, the *Ethier Sand & Gravel Limited* case, [1979] OLRB Rep. Oct. 962 and the *Canadian Road Asphalts Limited*, case, [1980] OLRB Rep. March, 299. On the facts before it, the Board finds that the applicant is not an employer within the meaning of section 106(c) of the Act.

...

In *Ethier Sand & Gravel Limited*, *supra*, at paragraph 9 the Board stated in part:

9. The respondent performs essentially the work of a supplier of materials to employers who apparently operate businesses in the construction industry. As a secondary feature, the respondent constructs roads from its own materials. There is no doubt that the construction of roads is included in the definition of "construction industry" in section 1(1)(f) of *The Labour Relations Act*. The delivery of materials to employers who are engaged in performing work at the site of the construction of roads is not the operation of a business engaged in construction of "works"

at the site thereof and does not fall within the definition of “construction industry” within the meaning of section 1(1)(f). See the *Cedarhurst Paving Co. Limited* case, [1964] OLRB Rep. Dec. 442. ...

Canadian Road Asphalts Limited, [1980] OLRB Rep. Mar. 299 in paragraph 17 states in part:

17. We are of the view that the production of asphalt does not fall within any of the activities included in the definition of the construction industry and that accordingly employees engaged in asphalt production at the plant are not employed in construction activity. ... However, we are of the view that this task is properly classified simply as the delivery of materials to be used in construction, and not itself a construction activity. See: *Ethier Sand & Gravel Limited*, [1979] OLRB Rep. Oct. 962.

15. We do not read Article I, in both agreements, to contemplate the inclusion of suppliers because their product may be “incidental” to the construction of the Pipeline. The material supplied was used in the manufacture of concrete weights which work is not in dispute. It does not make labour relations sense to interpret the words “incidental thereto” (in Article I) to include suppliers of materials used in the pipeline construction or any other construction projects. This could include a wide variety of suppliers and this cannot be the meaning of Article I. For example it would be a strange result to say that the manufacturer and supplier of the pipes, such as Dofasco or Stelco, is bound by the Mainline Pipeline Agreement. The facts in *Majestic Wiley Contractors Limited*, [1979] OLRB Rep. March 229 can be distinguished from the facts before us.

16. The Pre-job Conference Report is neither a collective agreement or a “settlement” and is simply a document reflecting what was discussed at the pre-job meeting. It is not enforceable as a collective agreement or minutes of settlement. The discussions that took place with respect to how the work would be performed is not an oral agreement in the context of settlement discussions in a grievance as contemplated in *Suss Woodcraft Ltd.*, *supra*.

17. For the foregoing reasons we find that the manufacture and supply of concrete from a permanent facility to a contractor manufacturing concrete weights for the pipeline project is not work covered by the Mainline Pipeline Agreement. These grievances are dismissed.

DECISION OF BOARD MEMBER J. KURCHAK: February 23, 1993

1. I dissent in part.

2. I agree with the majority decision in its conclusion that the batching plant in question is a permanent structure.

3. I would agree that the plant in Cochrane would not be considered a construction site as defined by previous Board decisions.

4. However, paragraph E of Article II of the Teamsters’ Pipeline Agreement alters the relationship with regard to this project. I read it as a sub-contracting clause, obligating the employer to use the Teamsters in the delivery of concrete to the construction site.

5. Therefore, I would say that this work is tied in as part of the Pipeline Agreement, and would, with respect rule in favour of the Teamsters in their grievance with the employers with regard to this part of the operation.

0122-92-U Canadian Union of Public Employees and its Local 1343, Complainant v. Deloitte & Touche, Respondent

Sale of a Business - Unfair Labour Practice - Respondent appointed by Ontario Court (General Division) as receiver and manager of nursing home in December 1991 - Union complaining that respondent failing to adhere to collective agreement between union and nursing home and refusing to bargain with union - Board finding respondent to be successor employer for purposes of the Act - Board remitting remaining issues to parties for consideration and remaining seized

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

APPEARANCES: *Nancy Rosenberg*, *Norman MacKenzie* and *Lucie MacKenzie* for the complainant; *John R. Read* for the respondent.

DECISION OF THE BOARD; February 15, 1993

1. This is a complaint under section 91 [formerly section 89] of the *Labour Relations Act* to the effect that the respondent has violated section 65 [formerly section 64] and section 68 [formerly section 67] of the Act by refusing to bargain with the applicant and failing to adhere to the terms of the collective agreement between the complainant and the Ottawa Centre Nursing Home Incorporated (referred to below as the nursing home). It is agreed that the named respondent was appointed by an order of the Ontario Court, General Division on December 19, 1991 to be the receiver and manager of the nursing home. The threshold issue between the parties, and the one dealt with in this decision, is whether or not the respondent is a successor employer for the purposes of the *Labour Relations Act*. The union asserts that it is; the respondent asserts that its appointment as receiver and manager did not involve a transfer or disposition of the nursing home business.

2. At the outset of the hearing, counsel for the respondent conceded that the court order appointing it did not preclude proceeding before the Board in the absence of leave of the court.

3. The parties had entered into the following agreed Statement of Facts, and argued the matter on that basis without need for oral evidence. They are set out without the appendices filed with the Board:

1. The Complainant is the exclusive bargaining agent for all employees of the Ottawa Centre Nursing Home Incorporated (the "Nursing Home"), except for persons above the rank of Supervisors, registered and graduate nurses, Activities Director, office and clerical staff and students employed during the school vacation period.
2. A collective agreement was in effect between the Complainant and the Nursing Home from October 1st, 1989 to September 30th, 1991.
3. In late 1990, it came to the attention of the Union that the Nursing Home was not contributing to the pension plan or paying union dues and approached the Nursing Home with respect to these violations.
4. On July 19, 1991, the parties agreed on a settlement with respect to this matter.
5. The Nursing Home did not honour this settlement and the violations continued.
6. On July 25, 1991 the complainant sent notice to bargain to the Nursing Home, however, no negotiations followed and the agreement remains in effect.

7. On October 4, 1991, a grievance was filed in respect of a number of violations of the collective agreement.
8. On November 27, 1991, the parties agreed on a settlement with respect to this matter.
9. The Nursing Home did not honour this settlement and the violations continued.
10. On December 19, 1991, the Respondent became the receiver and manager of the property, assets and undertaking of the Ottawa Centre Nursing Home pursuant to a court order of the Honourable Justice Isaac.
11. The court order was obtained on an ex parte motion by Ernst & Young Inc., the liquidator of Standard Trust Company who in turn held certain security over the assets of the Ottawa Centre Nursing Home.
12. On February 3, 1992, the Complainant sent notice to bargain to the Respondent.
13. On February 10, 1992, the Respondent replied to the Complainant's notice by stating that it did not intend to enter into any form of negotiations with the Union.
14. On February 19, 1992, a grievance was filed regarding violations of the collective agreement regarding vacation entitlement.
15. On February 19, 1992, a grievance was filed regarding violations of the collective agreement regarding welfare benefits.
16. The Respondent took the position, with respect to these grievances, that it was not bound by the collective agreement. On March 2, 1992, the parties agreed to hold these two grievances in abeyance.
17. The Respondent, since its appointment, has continued the operation of the Nursing Home. It has advised the Complainant that the primary goal of the receiver is to sell the Home as a going concern and that all efforts have been made towards that goal.
18. The Respondent, since its appointment as receiver/manager has not adhered to the terms of the collective agreement between the Complainant and the Nursing Home.
19. Specifically, the Respondent has not complied with Article 4 (union dues), Article 16 (vacation entitlement), Article 20 (extended health care plan) and Article 24 (uniform allowances).

4. The union submits that the terms and purpose of section 64 are broad enough to and should encompass all receiverships. However, it is argued that the facts of this case do not require such a broad finding. It is submitted that the case law overwhelmingly draws a crucial distinction between court appointed receivers (judicial receiverships) and receivers appointed pursuant to instruments such as debentures (private receiverships). It is counsel's submission that for the most part, those appointed pursuant to instruments are not considered successor employers, whereas those appointed pursuant to court orders are considered successors if they operate the business. We are urged to follow the case law which finds that court appointed receivers are successors. Union counsel asserts that the case law is clear that any receiver is bound by the collective agreement, and must uphold their terms during the term of the operation of the receivership.

5. Union counsel acknowledges that *Price Waterhouse* [1983] OLRB Rep. July 1184 is an exception to the case law to the effect that a court appointed receiver is also a successor employer. Noting that the decision of the Board in that case was based on an agreement by counsel that there should be no distinction between the two kinds of receiver, we are urged to find that we need not come to the same conclusion. Counsel argues that there is good reason for the distinction between a court appointed and privately appointed receiver if there is going to be any kind of receiver who

does not become a successor. The court appointed receiver is an officer of the court, not an agent of the debtor. Thus, court appointed receivers' functions are not just to gain as much as possible for the creditor who appoints them. They have obligations to the court well beyond those of a private receivership. Union counsel asked us to follow *RASL Ventures et al* [1988] 17 Can LRBR 1 (B.C. LRB). Union counsel also referred to the following cases in argument: *Mount Citadel* [1976] OLRB Rep. July 367; *Toronto Dominion Bank and Price Waterhouse Ltd.* [1979] OLRB Rep. Jan. 50; *Price Waterhouse et al* [1983] OLRB Rep. June 944; *Price Waterhouse et al* [1983] OLRB Rep. July 1184; *Uncle Ben's Industries Ltd. et al* [1979] 2 Can. LRBR 126 (B.C. LRB); *Fraser Valley Arenas Ltd.* [1979] 3 Can LRBR 195 (B.C. LRB); *Ontario World Air Ltd. et al v. Price Waterhouse et al* [1981] 2 Can LRBR 405; *St. Louis Bedding Co.* [1982] 42 C.B.R. 75 (BCTQ); *Weldco-Beales* [1991] 12 CLRBR (2d) 133 (B.C. IRC); *Hamilton Cargo Transit Limited* [1983] OLRB Rep. June 887; *Maritime Life Assurance Company v. Chateau Gardens (Hanover) Inc. et al* [1983], 43 O.R. (2d) 754.

6. The position of the respondent receiver and manager is that because it is only operating the business for the purpose of preserving it until sale it has no obligations to the union. The respondent's position is that the receiver is not bound by the collective agreement for two reasons. Firstly, it is submitted that there is no collective agreement in force because of the continuation clause of the collective agreement, which provides that the agreement only continues in effect unless there is notice to bargain. Here, where notice to bargain was given, we are urged to find there is no collective agreement in effect which could bind the respondent.

7. Secondly, counsel says that if the concepts and consequences of commercial law are to mesh with labour relations law, the July 1983 *Price Waterhouse* case, referred to by union counsel above as the exception, should be followed. As in that case, the respondent's position is that there has been no disposition of the business, therefore no successorship arises under the Act. Counsel urges us to give the *Maritime Assurance* decision, cited above, less weight. It arises out of the same set of facts as the *Price Waterhouse* decision, never mentions the Board's decision that a successorship did not arise, and has an error in it. The decision says that title to the assets passed with the appointment of a receiver, which is incorrect.

8. Further, respondent counsel argues that the contracts of employment are terminated as if the debtor had ceased doing business. Counsel acknowledges that the receiver became the employer, but says that the transfer or disposition that is necessary for a sale did not occur. In counsel's submission, the receiver has possession of the assets for a very different purpose than what the *Labour Relations Act* provisions intended. They have them for the limited purpose of finding a third party purchaser.

9. In particular, respondent counsel strenuously objects to the idea that a receiver should be responsible for the past obligations under the collective agreement as claimed by the union. He characterizes the union's case as a search for "deep pockets". He says this would be to totally reprioritize the obligations of the bankrupt and this would not be in keeping with any statutory authority. Any past obligations arising from the activities of the nursing home should be dealt with in the ordinary course of the bankruptcy. Employer counsel necessarily referred to many of the same cases as the union, as well as *Price Waterhouse Limited* [1983] OLRB Rep. Mar. 441 and *C.U.P.E. and Casselman Nursing Home*, a decision of a board of arbitration chaired by David Kwavnick, dated January 20, 1992. He also referred to textbook authorities on receivership.

10. In reply, union counsel says, referring to the freeze conditions under section 79 [now section 81] of the Act, that it is not the law that the collective agreement terminates because notice to bargain is given.

11. As to the point that the common-law terminates the employment contract, counsel maintains that this is no longer the law, or in the alternative it is not relevant for a decision on this issue. She refers to *Uncle Ben's Industries Ltd.*, above, which deals with the history of the common-law position on this point. The union's position is that *McGavin Toastmaster* (1975), 54 D.L.R. (3d) 1 had settled the point. It is the labour relations regime and not the common-law which applies, since we are not talking about individual contracts of employment. Union counsel maintains that the texts referred to are merely the opinions of the author, and not of particular assistance. She disagrees that the *Maritime Assurance* case hinges on the one admittedly inaccurate point that title is lost by an owner on the appointment of a receiver and manager by the court.

12. Finally, counsel strenuously rejects the idea that all the union is trying to do is find deep pockets. She maintains that a receiver who is in the employer's place temporarily, but with full authority to pull in all the receivables, should have the same obligations that would ordinarily have been offset against those receivables.

Decision

13. The question we must determine is whether or not the receiver in this case, who is operating the business of the nursing home pursuant to the authority of a court order, has the status of a successor employer under section 64 of the Act. Section 64, in relevant part provides as follows:

64. (1) In this section,

“business” includes a part or parts thereof;

“sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 54, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 54, as the case requires.

14. As can be seen from the argument set out above, the dispute between the parties is centred around whether or not there has been a disposition. There is no dispute that the receiver is operating the business. Thus, if there has been a disposition of the business, the receiver and manager would be the successor employer. This makes this case different from the great majority of sale of business cases, where it is agreed that there was a disposition of something, but the parties cannot agree on whether or not what was disposed of was the business (or part thereof).

15. As has been observed in many of the cases, the definition of sale is quite a broad one including specific reference to the word lease and the very broad phrase “any other manner of dis-

position". The Board, with judicial approval, has held that in the labour relations context and given the broad wording of the statute, an expanded meaning of the word sale is warranted. In *Thorco Manufacturing Ltd.*, 65 C.L.L.C., para. 16,052, the Board said as follows:

According to its strict signification, the term sells is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section 47a [now 64], however, the word sells has been given a wide definition which includes lease, transfers and any other manner of disposition of the business or part thereof. In legal parlance the word lease generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time.

The word transfers, however, is obviously a term of wide significance and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word transfers to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word transfers, it is our opinion that the generality of the words any other manner of disposition is not intended to be in any way limited or interpreted ejusdem generis with the words leases, or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words and any other manner of disposition as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that sells includes leases or transfers.

It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act* R.S.O. 160 c. 191). Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction.

16. In writing for the Divisional Court in *Re Hughes Boat Works Inc. and U.A.W.*, (1979) 26 O.R. (2d) 420 at 432, Mr. Justice Reid commented as follows:

Was the interpretation made of s. 55 [now 64] by the Ontario Labour Relations Board unreasonable? There were two factors to which the Board made special reference. The first was the expanded meaning of the word "sale". "Sale" is used in the statute in a special sense, a much wider sense than it is ordinarily accorded. In ordinary parlance a lease is not a sale. As used in s. 55 [now 64], however, sale includes lease. The inclusion of a meaning that is in a sense the very opposite to the ordinary meaning of the word "sale" suggests to me that the Legislature intended a very broad meaning indeed for the word "sale" in s. 55. This makes irrelevant a good many of the decisions relied on by [the] applicant in which Courts were called on to interpret the word "sale" in other contexts.

Thus, "sale or other manner of disposition" means something very different in the labour relations context of a sale of a business than it does in its ordinary or commercial law sense. Labour relations considerations must govern when interpreting section 64.

17. It is clear then that, in applying the section to the facts before us, the labour relations purpose must be kept in mind. This was discussed in *C.U.P.E. v. Metropolitan Parking Inc.*, [1980] 1 Can. LRB 206, in part, as follows:

It is important to emphasize, however, that section 55 of the Act [now 64] of the Act has never been regarded merely as an "unfair labour practice" provision, directed at schemes" designed to

subvert bargaining rights. The section is also intended to preserve bargaining rights in the case of *bona fide* business transactions (i.e., transactions undertaken for purely commercial reasons and untainted by any anti-union motivation) which *incidentally* undermine the industrial relations *status quo*. This two-fold purpose was discussed by the Board in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 703:

The purpose of section 47a (now section 55) becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect "paper transactions", and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond "paper transactions" to achieve that purpose. See e.g. *Kem's Masonry*, December 1964, OLRB Mthly. Rep. 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue the bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business.

In recent years most of the litigation before the Board has involved increasingly complex, but *bona fide*, business transfers which result in the same kind of dislocation as a simple bilateral sale. Collusive arrangements, or transactions explicitly designed to subvert bargaining rights, have become much less common; and can, in any event, be dealt with under sections 56, 58 and 61 [now 67, 68 and 71] of the Act.

18. Has anything been transferred or otherwise disposed of in this case within the meaning of section 64? The first exercise must be to examine the event which is said to constitute a sale under section 64. Here it is the appointment of, and attendant transfer of power to, the receiver and manager that is said to be the event which constitutes the sale within the meaning of the statute. The terms of the alleged sale are defined by the order of the court which is the source of the receiver and manager's powers.

19. It is useful to summarize the essential elements of the order. By virtue of that order, the respondent became receiver and manager of all the property, assets and undertaking of the nursing home, including the nursing home license, and any rights or privileges whatsoever pertaining to the said license. It was specifically given the authority to operate the business, and has done so. The assets of the nursing home were ordered to be delivered to the receiver and the receiver was to protect and insure that property "pending sale thereof by private sale, sale by tender, or otherwise, as the receiver shall in its absolute discretion elect". Other powers of the receiver include the right to prosecute and defend legal actions as necessary for the proper protection of the property.

20. Some attention was given to paragraph 5 of the order which reads as follows:

5. **THIS COURT ORDERS** that the Receiver shall be at liberty to appoint an agent or agents (including an independent manager of the Property) and such assistants (including barristers and solicitors, and any of the servants, employees, officers and directors of the Defendant) from time to time as it may consider necessary for the purpose of preserving the Property and carrying on the business of the Defendant relating to the Property and performing any of its duties

and powers hereunder, *provided however that the employment or retention of any employee of the Defendant shall not constitute the Receiver as a "successor employer"* to the Defendant or any of its affiliates or otherwise make the Receiver liable for obligations of the Defendant or any of its affiliates to their employees.

[emphasis added]

It is our view that this provision cannot be determinative in this case. It is the Board's exclusive jurisdiction to determine whether there has been a sale for labour relations purposes. The respondent cannot be relieved of its statutory obligations under the Act by the above term of the Order, and it is not apparent that was the intended effect. In any event, the Board would not be of the view that retention of any employee or employees (which is the extent of the above provision) would alone constitute the receiver and manager a successor employer in any event. The retention of employees is a factor to be considered, particularly on the question of whether the business has continued. (See also the comments of the Board in *CUPE v. Metropolitan Parking*, *supra*, to the effect that the retention of employees is only one factor to be considered and is not necessary to a finding of a sale. If it were otherwise, the simple expedient of not retaining employees would avoid the section). In any event, as noted above, it is conceded that the business has continued, and thus the question of the retention of employees is not central to the current case.

21. Continuing on with the consideration of the terms of the receiver and manager's appointment, we note that the right of the receiver to sell is not absolute. For any sale in excess of \$250,000 and any sale or disposition of the nursing home license or any part thereof, or any sale of real property, the consent of the defendant or the approval of the court is necessary. Fees and rents formerly owing to the nursing home are to be paid to the receiver. The receiver is at liberty to borrow and to pledge the nursing home as security which ranks in priority to any charge on the property if the borrowing is for the purpose of protecting and preserving the property, subject to the \$250,000 limit. The receiver's remuneration is by way of fee, with the power to advance itself monies against the fees eventually fixed by the court. The fees and expenses of the receiver constitute a first charge against the property.

22. Thus the receiver and manager in this case has wide, but not absolute powers. Title to the property and assets of the nursing home has not passed to the receiver and manager. However, a court appointed receiver acts as principal and not as agent of the employer. It was not argued otherwise. See, among others, *Mount Citadel Limited*, [1976] OLRB Rep. July 367. The respondent in this case admits that it is the employer of the nursing home employees and therefore, in that respect, is clearly acting as principal. All the incidents of ownership and elements of the business, with the exception of title, have passed to the receiver and manager.

23. One of the most recent cases of this Board which discusses the issue of successorship under the Ontario legislation in the context of a receivership is *Hamilton Cargo Transit Limited*, [1983] OLRB Rep. June 887. In that case an instrument appointed receiver and manager, who had an agreement with the major creditor of the failing business, arranged for a numbered company to operate the business. The Board concluded that the arrangement between the receiver and the numbered company had the attributes of a lease more than the attributes of an ordinary sale. Having regard to the broad definition of "sale" in the Act which specifically includes lease the Board commented as follows:

"The very use of the word 'lease' in the definition in the Act seems to leave no doubt that the transfer of assets contemplated by the section may be for a limited period only, and that title to the assets need not pass at all. The inquiry is by no means academic, since an arrangement like the present may continue for months or even years prior to the time that an ultimate sale of the business is completed."

The Board found that the arrangements between the receiver and the operator of the business was a sale of a business within the terms of the Act, albeit on a limited term basis and with the restrictions necessary to preserve the business “as is”.

24. The respondent in *Hamilton Cargo Transit Limited*, summarized above, had no more control over the operation of the business than the receiver and manager in this case. Indeed, it would appear that the receiver and manager on our facts has more control given its power to effect sale, albeit with the approval of the court. A further distinguishing factor between the two is the right in the operator in *Hamilton Cargo Transit* to operate for profit, rather than to receive fees, as the Receiver and Manager does on our facts. However, there is nothing in section 64 which requires the potential of profit in the definition of business; non-profit operations are equally subject to the Act. See, for example, the remarks in *Parkwood Hospital*, [1980] OLRB Rep. May 759 at para. 11 and following.

25. The 1979 *Price Waterhouse* decision, *Toronto Dominion Bank v. Price Waterhouse*, [1979] OLRB Rep. Jan. 50 (the Haladner decision) case referred to in *Hamilton Cargo Transit Limited* was the first of a trilogy of *Price Waterhouse* cases which were central to the argument before us. The 1979 application for successorship was brought when the business was being operated by an instrument appointed receiver so that the bank which held the first charge on the assets might enforce its security. The Board found that although the receiver was carrying on the business for the benefit of the bank to which it owed a fiduciary duty, its actions were those of the company which retained the legal and equitable ownership of the assets. Therefore, the Board concluded that a disposition of the business had not yet occurred and the application was premature.

26. The next in the series of *Price Waterhouse* cases was *UFCW v. Price Waterhouse*, [1983] OLRB Rep. June 944 (the Picher decision) and concerned a company known as Windsor Packing. Like the 1979 *Price Waterhouse* decision of the Haladner panel this involved Price Waterhouse as an instrument appointed receiver. Based on the idea that the privately appointed receiver in that case remained the agent of the insolvent company, the Board followed the earlier Price Waterhouse decision and found the successor application to be premature.

27. In another *Price Waterhouse* decision, [1983] OLRB Rep. July 1184 (the Furness decision), the Board dealt with the financial difficulties of Chateau Gardens Nursing Home. Price Waterhouse had been appointed receiver and manager first under a debenture and then by court order. Counsel agreed, and the Board accepted, that there should be no difference for labour relations purposes between a court appointed and a debenture appointed receiver in the following passage at paragraph 15 and 16:

15. A number of decisions of other Canadian Labour Relations Boards were cited to the Board. None of the cases cited were directly on point, see *Ontario Worldair Ltd.* 81 CLLC ¶16,117; *Fraser Valley Arenas (1975) Ltd.* (1979) 3 Can. L.R.B.R. 195; and *Uncle Ben's Ltd.* (1979) 2 Can. L.R.B.R. 126. These cases considered different situations where a receiver or a manager or a receiver and a manager or a mortgagee in possession were involved and whether there was a difference between privately-appointed receivers and managers as opposed to court-appointed receivers and managers. It is clear that there are valid distinctions to be made in the field of commercial law in these areas for the property rights of the parties may be differently affected depending on the terms of the private instrument under which a receiver or manager are appointed compared with a court-appointed receiver or manager. It was agreed by counsel before the Board that from a labour relations point of view no distinction ought to flow from whether receivers and managers are appointed under the terms of a private instrument or by a court. The Board agrees that obfuscation ought to be avoided by all means. (cf. *Price Waterhouse Ltd.*, [1983] OLRB Rep. June 000 (sic))

16. This Board is in sympathy with this approach. In our view, the question of whether there has

been a sale under section 63 [now 64] is best approached by identifying the employer which is bound by the bargaining rights, the business or part thereof which is affected by the application, the function actually being performed by the receiver and/or manager, whether there has been an actual sale, lease, transfer or other manner of disposition of a business or part of a business and the identity of the person to whom such a sale, lease, transfer or other manner or disposition has occurred. We therefore find that the consequences upon labour relations flowing from a court-appointed receiver are no different than those which result from the private appointment of a receiver.

28. The emphasis on the actual function of the receiver and/or manager rather than on the form of the appointment is consistent with the Board's established jurisprudence in sale of business cases that it is not the form, but the substance that will determine the result. See, among many others, *Thunder Bay Ambulance Service*, [1978] OLRB Rep. May 467 at paragraphs 11 and 12. We understand the conclusion that the consequences in labour relations following from court appointment are no different than those which result from the private appointment of a receiver in that light. Each set of facts must be dealt with to see what has actually occurred; the fact alone of a judicial or private receivership will not be the end of the enquiry. None of the cases gives automatic meaning to the event because it is one or the other. In our view, the Furness decision does not stand for the proposition that a judicially appointed receiver cannot acquire the status of a successor under the Ontario legislation.

29. The Furness panel of the Board found the functions of Price Waterhouse to be the receipt and disbursement of money in the managing of the business. It found that Chateau Gardens (the original owner) continued to exist with "control over the indispensable license to operate". It further found that Chateau Gardens remained the employer and that the collective agreement was being honoured on its behalf. On this basis, the Board found no successorship. There are significant differences in the case before us. For instance, the receiver manager has conceded it is the employer, and the court order gave it control over the nursing home license as well as all the other assets and functional elements of the nursing home business.

30. After the Furness decision, there was a further chapter in the Chateau Gardens receivership saga. Having failed to establish a successorship at the Board the union was before the court on the application of the receiver-manager for directions on how the assets and undertaking should be distributed on its later sale. This case is cited above as the *Maritime Assurance* decision, named after the principal creditor who had appointed Price Waterhouse as the receiver under its debenture. The court was specifically considering the effect of a retroactive wage award by an interest arbitrator under the *Hospital Labour Disputes Arbitration Act*. The question concerned who was responsible for wages ordered to be paid retroactively to the time before the appointment of the receiver. The court found that the claim of the employees should be excepted from the ordinary rules of priority which would have had them only ranking as unsecured creditors. This was explicitly based on the successor rights provisions of the *Labour Relations Act*. There are two particularly notable aspects of this decision. One is that the Furness decision which had explicitly found that there was no successorship under those same provisions for the very same parties is not referred to, although other labour board decisions that preserve the distinction between court appointed and instrument appointed receivers are referred to. Secondly, in recounting the general effects of a court appointment, the court made the statement, erroneous in its reference to loss of title, that the company remains in existence but has lost its title to and control of its assets.

31. The rejection of the distinction between private and judicial receiverships for the purposes of labour relations in the Furness decision lead the B.C. Labour Relations Board to give the issue detailed attention and analysis in *RASL Ventures Ltd.*, cited above. The B.C. Board also dealt with the problems with the *Maritime Assurance* decision in the following passage at page 16:

It has been argued that the court's judgement in *Maritime Life Assur. Co.* was based, in part, on the erroneous finding that a court appointed receiver-manager obtains title to the assets of the corporation upon its appointment. In point of fact, Madam Justice Van Camp stated that "[t]he company remains in existence but has lost its title to and control of its assets" (at p. 556). Nevertheless, we do not find the absence of title in a receiver-manager to be determinative. It is more relevant to focus on the control which a receiver-manager has over the assets and, more generally, the control which it has over the business operation as a going concern together with the employment relationship. Some of these points were considered by the Ontario Board in *Hamilton Cargo Transit Ltd.*, *supra*, albeit in the context of an instrument appointed receiver-manager.

The B.C. Board went on to further rely on the *Hamilton Cargo Transit* decision and to note that although *Hamilton Cargo Transit* dealt with an instrument appointed receiver there were two propositions of central relevance established in that decision: firstly, that a finding of successorship is not dependent upon the passing of title in the assets of the corporation and secondly, that a successorship declaration may be granted even where the disposition of a business is only intended to continue for a limited period of time. We agree with these propositions.

32. The B.C. Board disagreed with the *Hamilton Cargo* decision to the extent that it turned on the idea that the business in that case was being run for the profit of the interim manager on agreement with the bank and the receiver. It cited other authority for the idea that a successorship should not be restricted to profit making economic activity. The B.C. Board in *RASL* went on to find that a court appointed receiver-manager could be found to be a successor employer in that it obtains possession and control of the assets of the corporation and to the extent that it operates the business does so as a principal. Thereafter an employment relationship between the receiver-manager and the employees of the business exists. In the case before us the receiver has specifically conceded that it is the employer of the employees and thus that point, which required some extensive analysis for the B.C. Labour Relations Board to determine, is not in issue before us.

33. Although the provisions of the B.C. *Labour Relations Act* are somewhat different, they are not different in substance on the issues before us, and there is nothing in the *RASL* decision which turns in any way on any difference in the legislative provisions in Ontario and B.C. The same cannot be said for *St. Louis Bedding Co.*, cited above, which was decided under the considerably different legislative provisions of the *Quebec Labour Code* which basically provide that when the business is "operated by another" a succession occurs. This is much broader language than the Ontario language and thus the Quebec Board's conclusion that an instrument appointed receiver/manager was a successor under that language is of limited assistance as to the interpretation of the Ontario language.

34. We return to, and agree with, the comment of the B.C. Board in the *RASL* decision set out above that it is relevant to focus on the control which a receiver manager has over the assets and, more generally, the control which it has over the business as a going concern and the employment relationship. If control of the operation has effectively changed hands, this will be an important indicator that a disposition, rather than just a change of a management team, has occurred.

35. The issue of control of the ongoing operation is also an element in Board cases determining whether part of a business has been disposed of or work merely contracted out. Where control of the operation has been given up, even if important elements such as a license are retained in the title of the original owner, a declaration of sale of a part of a business by way of contracting out is more likely. On the other hand, where effective control of the operation through decision making power is retained with the original owner, a finding of sale is less likely. See for instance, *Don Mills Bindery*, [1983] OLRB Rep. Dec. 2008 and *Ontario 474619 Ltd.* [1981] October 1452. In

both cases, where retention of decision making remained with the original owner, no declaration was made of a sale of a business.

36. By contrast, in *James River-Marathon Ltd.*, [1983] OLRB Rep. October 1672, the acquisition and retention of an essential license in the ownership of one party did not mean it was the successor employer where it had simultaneously leased the woodlands operation. This was because the lessee rather than the lessor operated and controlled the woodlands portion of the business. Instead, the lessee was the successor employer. See also *Caressant Care* [1984] OLRB Rep. Aug. 1060, at paragraphs 22 to 26, in particular. There, the Board found that a sale of a business had occurred to the new operator (soon to be new owner) when the operator had commenced operation and control of the business despite the retention of the license to operate a nursing home in an interim phase by a receiver before a sale to the new owner was complete.

37. It is the essence of the role of a receiver to change the ambit of the owner's control. One of the excerpts filed by the respondent from E. Bruce Leonard's *Guide to Commercial Insolvency in Canada*, expressed it this way, at paragraph 341:

In the case of both private receiverships and judicial receiverships, the object and purpose of the remedy is to deprive the debtor of control of the property in his possession. The remedy is based upon the protection of rights of creditors, shareholders or the public as a result of the higher rights given under private contract, general corporate legislation or particular public-interest legislation.

38. To what extent has control of the nursing home operation passed to the receiver and manager in the case before us? Control of the day to day operations of the home has passed to the extent that the receiver agrees that it is the employer. There is no evidence that Ottawa Centre Nursing Home retains any control over the operation of the business, other than as mentioned in the court order. In that order, the significant reference to any role for the owner is that the sale of the property, the license, or assets over \$250,000 cannot be effected without the owner's consent or order of the court. However, throughout the order it is clear that the initiative is in the hands of the receiver. The owner can facilitate a sale arranged by the receiver, but ultimate control is with the court, not with the owner. This is not a significant amount of control for labour relations purposes, in our view. The extent of the transfer of power over the assets of the owner and more importantly control over the operation of the nursing home is a transfer of control at least as extensive as a lease. As noted above, "lease" is specifically mentioned as an intended component of the Act's definition of sale. The receiver and manager here apparently has virtually complete control over all the necessary incidents of the economic vehicle, the business, to which bargaining rights attach. We are therefore of the view that a finding that the respondent is a successor employer is warranted in this case.

39. We have carefully considered the respondent's argument that since the only reason it is operating the nursing home is to be able to sell it, it is only on the eventual sale that a successorship should be found. The labour relations rationale for such a proposition is not evident. It suggests that the bargaining rights of the applicant would be indefinitely in limbo pending a sale, or presumably the decision to liquidate if a sale proved impractical. The owner's role in employment matters on the material before us is non-existent. The real employer, by its own admission, is the respondent. There is no labour relations reason to require the applicant to deal with a party with no effective control of the employment relationship.

40. The parties also argued about the extent of the liability of the respondent if it was found to be a successor. The respondent does not dispute that if it is a successor it is liable from the date of its appointment. It strenuously resists liability before that date. We were referred by the union

to the decision of the Ontario High Court of Justice in *Re United Brotherhood of Carpenters and Joiners of America, Local 3054 and Cassin-Remco Ltd.*, (1979), 105 D.L.R. (3d) 138 where a related question of liability was decided. This decision was referred to and relied upon by the court in *Maritime Life Assur. Co. v. Chateau Gardens*, referred to above. This was the further development in the financial difficulties of the 1979 *Price Waterhouse* decision, mentioned above, in which the Board had decided that it was premature for the union to apply for successorship in an instrument-appointed receivership.

41. On the question of the extent of liability, as noted in *Hamilton Cargo Transit Limited*, cited above, the Board's function under the successorship provisions is to make a declaration of legal rights, and not to make the findings of liability consequent upon those rights:

12. The Board under section 63 [now section 64] of the Act issues a declaration of legal rights only, and does not, on its own, make any findings of past liability consequent upon that declaration.

On the agreed facts, the union in the instant case had given notice to bargain both to the predecessor and the respondent, a giving of notice which would be pursuant to section 54 [formerly 53]. Therefore it is section 64(3) that applies to this situation. We are of the view that further comment about the liability of the receiver is not warranted, since we are not here deciding the merits of any claims the union might have. In the circumstances, it is also not necessary to address the employer's argument about the effect of the continuation clause of the collective agreement.

42. The parties directed no argument to the unfair labour practice framework in which this matter was commenced. It was clear that the first issue between them was whether or not there was a successorship. We remit any remaining issues to the parties for consideration. We will remain seized if there is any further aspect of this case that needs to be determined. A labour relations officer is hereby authorized to contact the parties to assist them in canvassing and dealing with any remaining issues between them. If either party wishes the Board to determine any matter remaining in dispute, it should write to the Board setting out those matters and the points it wishes to make together with a statement as to whether it wishes a further oral hearing on those points.

43. For the reasons set out above, the application is allowed to the extent indicated.

1206-92-JD Ellis-Don Limited, The Jackson-Lewis Company Limited, Eastern Construction Company Limited and Konvey Construction Limited, Applicants v. United Brotherhood of Carpenters and Joiners of America, Local 27, and Labourers International Union of North America, Local 183, Responding Parties

Adjournment - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Sector Determination - Board declining to defer complaint to arbitration proceedings under the agreement between Labourers and Carpenters unions - Board denying request to make determination as to which sector of the construction industry the work in dispute falls into before proceeding with the merits of the jurisdictional dispute - Parties directed to file additional material according to timetable set by the Board

BEFORE: S. Liang, Vice-Chair, and Board Members W. N. Fraser and G. McMenemy.

APPEARANCES: Joseph Liberman for the applicants; S.B.D. Wahl and T. Dionisio for Labourers, Local 183; and David McKee, Ucal Powell and Lorenzo Monaco for Carpenters, Local 27.

DECISION OF THE BOARD; February 11, 1993

1. This is a complaint concerning work assignment filed pursuant to the provisions of section 93 of the *Labour Relations Act*. The companies which are the original applicants in this complaint are Delta Catalytic Corporation, Ellis-Don Limited ("Ellis-Don"), The Jackson-Lewis ("Jackson-Lewis") Company Limited and Eastern Construction Company Limited ("Eastern"). Having regard to the agreement of the parties dated September 14, 1992 and filed with the Board, the complaint as against Delta Catalytic Corporation is withdrawn with leave of the Board. The title of these proceedings is thus amended to delete Delta Catalytic Corporation.

2. In its reply to this complaint, dated August 24, 1992, the United Brotherhood of Carpenters and Joiners of America, Local 27 ("the Carpenters") states that the jurisdiction over the work in dispute has been assigned to the Carpenters by virtue of an agreement between the Carpenters and the Labourers International Union of North America Local 183 ("the Labourers"). The Carpenters also state that they intend to request that the Board adjourn its proceedings under section 93 pending the disposition of private arbitration proceedings under the provisions of the agreement. On January 4, 1993, the Board convened a consultation with respect to the complaint in accordance with section 93(1.1) of the Act. The parties agreed to request that the Board determine the issue raised by the Carpenters prior to proceeding with the complaint. The Board heard the parties' submissions with respect to the request to defer the proceedings. The Board also heard submissions as to how this complaint should be dealt with by the Board if it were not deferred, and reserved its decision on all issues canvassed.

3. The Board was also informed during the course of the day that the complaint with respect to Konvey Construction has been settled by the parties, subject to final review of the terms of the Minutes of Settlement by counsel for Konvey. On this basis, the Board did not hear any submissions with respect to the further processing of this complaint. The Board directs the parties to notify the Board in writing by no later than March 12, 1993 whether this matter has been settled and if not, what the parties submit should be the course of action with respect to this complaint.

4. With respect to the complaints remaining, involving Ellis-Don, Jackson-Lewis and Eastern, the parties have agreed that these matters should be dealt with by the Board together. There is no dispute that the provisions of section 93, as they have been amended, apply. Counsel for the Carpenters terms the Carpenters' position as a request that the Board issue an interim order under section 93(1.2) deferring this complaint until the disposition of the private arbitration.

Background of the Dispute

5. The complaint concerns concrete forming work which has been subcontracted by Ellis-Don, Jackson-Lewis and Eastern. Ellis-Don is the general contractor in connection with the Metro Hall Project in downtown Toronto. Ellis-Don has subcontracted concrete forming in relation to an outdoor seating area, a retaining wall and planters and other decorative forms to a landscape subcontractor, which has in turn assigned the performance of this work to members of the Labourers. The Carpenters filed a grievance against Ellis-Don with respect to this subcontract on November 6, 1991. Jackson-Lewis is the general contractor with respect to the construction of the Hewlett-Packard head offices in Mississauga. Jackson-Lewis has subcontracted concrete forming in relation to outdoor planter boxes to a landscape subcontractor, which has also in turn assigned the performance of this work to members of the Labourers. The Carpenters also filed a grievance with

respect to this, dated April 21, 1992. Eastern is the general contractor in connection with the Confederation Life Project in downtown Toronto. Eastern has subcontracted concrete forming in relation to walkways around the building to a landscape subcontractor, which has also in turn assigned the performance of this work to members of the Labourers. The Carpenters' grievance with respect to this is dated April 29, 1992.

6. The grievance against Ellis-Don was referred to the Board for arbitration on November 11, 1991. After an attempt to settle the matter failed, it was listed for hearing on June 22, 1992. At that time, the matter was adjourned on consent in order to permit Ellis-Don to file a complaint under section 93 of the Act. On July 20, 1992, the three companies filed a joint complaint regarding the work in dispute under the grievances. We have referred to the reply filed by the Carpenters. In the reply filed by the Labourers, the position taken is that the work in dispute falls within the landscaping sector of the construction industry and does not fall within the industrial, commercial and institutional sector ("ICI"). The Labourers on this basis disagree that the work in dispute is governed by the agreement. Counsel for the Labourers stated at the hearing that the Labourers are asking the Board to recognize landscaping as a sector, notwithstanding that it is not mentioned in section 119 of the Act defining the term "sector" for the purposes of the Act.

7. The Board was given a copy of the agreement entered into on May 15, 1991 naming as parties three local unions, the Formwork Council of Ontario, and a number of employer associations. The agreement, however, has only been *signed* by the Formwork Council, the Labourers, the Carpenters and the International Union of Operating Engineers, Local 793. Whatever the intention may have been when the document was drafted, it has not been signed by the employer associations, nor by any of the individual employers before us. The Carpenters and the Labourers acknowledge that they are bound by this agreement and that it is still in effect. This agreement is commonly referred to by the parties as the "peace treaty". It appears that the agreement was the culmination of lengthy negotiations aimed at settling disputes between the unions over work jurisdiction. The preamble to the agreement states:

WHEREAS the parties are desirous of agreeing on the performance of certain work on projects in Ontario Labour Relations Board Geographic Area No. 8, excluding that portion which lies south west of Highway 25, and Simcoe County ("the Geographic Area").

...

8. The agreement sets out various understandings between the unions as to which trade shall perform certain work, as well as obligations on the part of each union to act consistently with the agreement. The agreement also sets out certain obligations on the part of employers; however, as we have noted, the employer associations named have not signed the agreement. In addition, the agreement contains a procedure for the resolution of disputes which arise out of the interpretation, application, administration or any alleged violation of the agreement. Some of the provisions to which we were referred in argument are:

3. The carpentry portion of concrete forming construction work on any other project in the Geographic Area which may be found to be in the ICI sector of the construction industry, other than on the projects referred to in paras. 1 and 2 above, shall be performed exclusively by members of Local 27 employed under the Carpenters' Provincial Agreement.

...

10. The Council and Local 183 undertake and agree not to bargain for, attempt to bargain for or conclude any collective agreement or other arrangement which is inconsistent with these Minutes of Settlement affecting carpenters represented by them

engaged in the carpentry portion of concrete forming construction on the projects in the Geographic Area covered by paras. 3 and 5, *supra*, nor to supply members directly or indirectly as employees to contractors acting in a manner contrary to these Minutes and any such collective agreement or other arrangement entered into contrary to this provision is null and void.

• • •

23. The parties hereto agree on the speedy resolution of any dispute which may arise amongst them in the interpretation, application or administration or any alleged violation of these Minutes of Settlement, including any of the definitions of the projects referred to in paras. 1, 2, 3, 4 and 5, *supra*, by final and binding arbitration under the *Arbitrations Act*, R.S.O. 1980, c. 25, within fourteen (14) days after the request for such arbitration is made. Arbitration shall be before a single arbitrator selected by the parties from a permanent panel of arbitrators set forth in Appendix "A" attached hereto and with the expense of such arbitration to be shared by all of the parties equally. Notice of the request for arbitration shall be given to the parties to these Minutes of Settlement and to the affected contractor who will have an opportunity to participate at the hearing and such award shall be binding upon them.
24. The parties hereto consent to any award of an Arbitrator being enforced in the same manner as a judgment or order of the Supreme Court of Ontario. Where the Arbitrator finds that any party to these Minutes of Settlement, including any, affected contractor, has violated these Minutes of Settlement then, in addition to any other relief which may be determined as appropriate, the Arbitrator shall be empowered to order said party or parties to compensate any party affected by the violation in damages, including interest.
25. The parties hereto undertake and agree to discontinue any proceedings pending before the Ontario Labour Relations Board which have not already been resolved by them in respect of jurisdictional disputes or any other proceedings involving matters covered by these Minutes of Settlement and agree in the future not to take any such proceedings which may vary or be in conflict with the terms of these Minutes of Settlement.
26. The parties undertake and agree to uphold these Minutes of Settlement in any proceedings before the Ontario Labour Relations Board and to support one another in cases of any challenge, directly or indirectly, to these Minutes of Settlement, including jurisdictional claims or related proceedings filed by any person or trade union before any tribunal.

9. Counsel for the Labourers acknowledges that if the Board were to determine that this work is in the ICI, then it is covered by the agreement. By letters dated September 8, 1992 from counsel for the Carpenters to counsel for the Labourers, the Carpenters informed the Labourers that they were invoking the arbitration provisions of the agreement, and proposed an arbitrator. In this letter, it is alleged that the Labourers are in contravention of the agreement by performing and continuing to perform the carpentry portion of concrete forming construction work in connection with the projects which are the subject of this complaint, and by failing to uphold the agreement in the course of this complaint before the Board. As a result of the failure by the Labourers to concur with the arbitration procedure and agree to an arbitrator, the Carpenters have brought a motion to the Ontario Court (General Division) seeking the appointment of an arbitrator. This motion has yet to be heard, as the parties are awaiting the Board's decision on the deferral issue.

Argument

10. Counsel for the Carpenters urges that the principle that parties ought to be held to the bargain that they have made ought to be sufficient reason for the Board to defer to the dispute resolution mechanism contained in the agreement. By paragraph 25 of the agreement, the parties

have acknowledged the primacy of the agreement, and of the procedures contained therein, over any proceedings to the Board. The parties have agreed not to take any proceedings to the Board which might "vary or be in conflict with" the terms of the agreement. By their very position in this complaint, the Labourers are in violation of the agreement. Counsel for the Carpenters stated that if the Board proceeds with the matter, it is in effect making it impossible for the Carpenters to enforce paragraph 25 of the agreement.

11. Counsel referred the panel to decisions of the Board in which the Board has placed considerable emphasis on agreements between unions in making determination of work assignment. The panel was urged to show the same deference to the trade agreement in this case.

12. Counsel for the Carpenters urged the Board to adopt the policy underlying the *Arbitrations Act*, R.S.O. 1991, ch. A.24. As recently amended, this Act permits parties to agree to submit to arbitration disputes which arise between them. Where a party to an arbitration agreement commences a proceeding to a court, the court is compelled to stay its proceedings, except under specified circumstances.

13. In counsel's submissions, the agreement before us does not *oust* the jurisdiction of the Board. The Carpenters' request is that the Board defer its proceedings, not terminate them. It would still be open to the parties to return to the Board if the arbitration process were not effective in resolving the disputes between the parties. In his submission, however, the arbitration could well determine, if not legally, then practically, the issues before the Board. It is appropriate for the Board to defer to it in the context of the agreement between the parties, and in the context of the public policy in favour of private arbitrations as expressed in the *Arbitrations Act*.

14. Counsel for the companies submits that the issue of deferral does not affect the companies. Since the companies have not signed the agreement, they have no place in an arbitration under the agreement. The companies have chosen to take their dispute to the Board. If the Board chooses to defer to arbitration, the results will not be binding on the company. The parties may find themselves back at the Board on the same issues that were the subject of the arbitration. Counsel points out that these proceedings were triggered by grievances filed by the Carpenters against the companies, not by proceedings against the Labourers under the agreement. By choosing to refer the grievance against Ellis-Don to the Board, the Carpenters have chosen the Board as their forum. As it appeared that the grievances raised issues of work jurisdiction, the companies have responded by filing a complaint under section 93 in order to have these issues determined.

15. It is also submitted that to the extent that there is an issue as to what sector the work in dispute belongs in, this is an issue that can only be determined by the Board under section 153 of the Act.

16. Counsel for the Labourers submits that the Act does not give the Board jurisdiction to defer to a private arbitration. The Act is a complete code. Section 93(13) of the Act sets out certain circumstances where the Board may defer a complaint under section 93. Absent those circumstances, the Board cannot decide to defer a complaint.

17. In any event, it is submitted that there are good reasons in this case not to defer to private arbitration. The private arbitration is a two-party procedure, arising out of an agreement between two unions. In many cases which arise under section 126 of the Act, the Board has decided that it is appropriate to defer arbitrations under a collective agreement to a complaint under section 93 where it is clear that the dispute underlying the grievance is in the nature of a work assignment dispute. The Board has preferred such disputes, in which multiple parties may

have an interest, to be determined in a forum in which all interested parties participate and in which the Board has greater remedial powers to resolve the dispute.

18. Counsel states that the complaint raises issues which go beyond the scope of the private agreement in any case. For instance, the companies have raised issues of area practice in support of their position, which they have a right to have determined by the Board. In determining the issues under the complaint, the Board may necessarily be engaged in interpreting the terms of the agreement, since one of the issues which will arise under this complaint is the applicability and significance of the agreement. The Board has done this in other cases of work assignment complaints. For example, in *Electrical Power Systems Construction Association*, [1992] OLRB Rep. Aug. 915, the Board interpreted the terms of an agreement respecting trade jurisdiction to find that it had been terminated.

19. Counsel for the Labourers agreed that the Board had the exclusive jurisdiction to determine sector disputes, and he relies on the wording in paragraph 3 of the agreement to support the view that the parties also intended the Board to have this exclusive jurisdiction. Finally, it was also submitted that if the Board looks for guidance to the *Arbitrations Act*, it should take into account that one of the circumstances under which a court is given the discretion *not* to stay a court proceeding in favour of an arbitration is where the “matter is a proper one for default or summary judgement” (section 7(2)5 of the *Arbitrations Act*). In counsel’s submission, the provisions under section 93(1.2) of the *Labour Relations Act* permitting the Board to decide matters under section 93 after a consultation with the parties, is analogous to a summary judgement procedure. If it is appropriate for a court to take jurisdiction over summary judgement matters, it must also be appropriate for the Board to decide not to defer its proceedings where such a consultation is available.

Decision - Deferral to Arbitration

20. We have decided that it is not appropriate for the Board to defer these proceedings under section 93 of the Act, to arbitration proceedings under the agreement between the Labourers and the Carpenters.

21. The Board is satisfied that it has the jurisdiction to defer its proceedings to other proceedings commenced under the Act or private agreements. Under subsection 93(1.1), the Board has a discretion as to whether to proceed with a complaint under that section, either by consultation or inquiry. The predecessor provision to subsection 93(1.1) [93(1)] likewise gave the Board the discretion to inquire into a complaint. The Board has on occasion exercised this discretion against inquiring into a complaint made under section 93. For example, in *E.S. Fox Ltd.*, [1990] OLRB Rep. May 504, the Board declined to proceed further with a complaint where the underlying dispute no longer existed. It would also be open to the Board to decline to proceed with a complaint in circumstances of extreme delay.

22. In this case, however, there are good reasons for the Board to proceed with the complaint. The complaint has been filed by three companies. The Carpenters have filed grievances against these three companies, claiming compensation for alleged violations of the collective agreement. The grievances are grounded in disputes over the assignment of work. Instead of being assigned to members of the Carpenters, which the Carpenters allege is required by the collective agreements, the work has been assigned to members of the Labourers. Although litigation with respect to the dispute was initiated as grievances, therefore, it is clear that the substance of the dispute is a jurisdictional one, in which there are multiple interested parties. In other similar cases, where it is apparent that the real dispute underlying a grievance is a jurisdictional dispute the Board has adjourned the arbitration of grievances brought under section 126 of the Act pending

the determination of the jurisdictional dispute under section 93: see, for instance, *PCL Constructors Eastern Inc.*, [1991] OLRB Rep. March 354. In this case, on agreement of the parties, the arbitration of the grievance against Ellis-Don was adjourned pending the filing of this complaint.

23. As in all such cases, the determination of the jurisdictional dispute complaint will clearly have an effect on the resolution of the grievances. Having filed the complaint in order to have these issues resolved, it appears to us that *prima facie*, the applicants have the right to have these matters dealt with by the Board.

24. The issues which arise under this complaint, and the issues which the Carpenters seek to have heard by arbitration under the agreement, overlap but are not congruent. In a section 93 proceeding, the central issue is the appropriateness of a disputed work assignment. In a private arbitration under the agreement, however, the parties are limited to issues which arise under the agreement. Here, the Carpenters allege that the Labourers are in violation of their obligations under the agreement. In adjudicating on this issue, an arbitrator may have to determine whether the work in dispute is covered by the agreement. In dealing with the section 93 complaint, the Board may also have to determine this issue, since trade agreements are an important factor which the Board takes into account in determining whether a disputed work assignment was appropriate. They are not, however, the *only* factor.

25. To the extent that there is an overlap between the issues which might arise in an arbitration, and the issues which might arise under section 93 complaint, the parties to the agreement have attempted to avoid duplication of proceedings. However, as we have noted, the agreement does not bind the applicants before us, who have a real interest in having these issues resolved. It seems to us that the likelihood of duplication of proceedings will be minimized where the issues are determined in the context of a section 93 proceeding in which all interested parties will participate and be bound by the result, as contrasted with a private arbitration involving only the parties to the agreement.

26. We agree with counsel for the Carpenters that parties ought to be encouraged to abide by the bargains they have made, and the Board's rulings should not discourage parties from settling trade disputes or from abiding by these settlements. However, we do not see our ruling here as having any detrimental effect on these private arrangements. By our ruling, we make no finding as to whether the Board would defer its proceedings under section 93 where *all* parties to a complaint are also parties to an agreement providing for a dispute resolution mechanism. In addition, our ruling does not affect the right of the Carpenters to seek remedies under the agreement for the alleged violations of the agreement by the Labourers. Clearly, there are issues between the Carpenters and the Labourers under the agreement which extend beyond the issues that are before the Board in this complaint. The Carpenters are not precluded by our determination from seeking to have these matters arbitrated.

27. With respect to counsel's arguments regarding the *Arbitrations Act*, it was acknowledged that the Board is not a "court" which is subject to the provisions of that Act. It was submitted however that the policies underlying that Act ought also to be applied by the Board. We accept that the Act is a reflection of public policies regarding the relationship between court proceedings and private arbitrations, and the encouragement of private arbitrations. However, we are satisfied that the Act contains no public policy which limits the *Board* in the exercise of its statutory powers. Further, the policies applied by a court under the *Arbitrations Act* in deciding to defer its proceedings to private arbitration may not be appropriate for an administrative tribunal acting under a specialized statute. In any case, we decline to apply them here.

28. Finally, we wish to comment on the effect of the Board's new powers and procedures

under section 93, as amended, on these issues. Section 93(1.1) permits the Board to *consult* with the parties affected by a complaint, or *inquire* into any matter raised by the complaint, or both. Section 93(1.2) permits the Board to make any interim or final order it considers appropriate after consulting with the parties *or* on an inquiry. The Act as amended gives the Board the power to make rules expediting proceedings under section 93, and the Board's new Rules of Procedure take up this invitation. The result is that the Act and the Rules now provide the framework for much more expeditious resolution of complaints under section 93 than had previously been the case. There is no reason to believe that deferring to private arbitration would result in prompter resolution of the jurisdiction dispute between these parties, as was suggested by counsel for the Carpenters, than simply proceeding with the complaint before us.

29. In fact, all parties have suggested that, if this panel ruled against deferring this matter to arbitration, the complaint be scheduled to a date for consultation. This appears to us to be a sensible suggestion, and it is entirely possible that the matter can be determined after such a consultation. Therefore, with this consultation date in mind, we now turn to the additional orders requested respecting procedure and additional filings.

The "Sector Issue"

30. Counsel for the companies requests that the Board make a determination as to which sector of the construction industry the work in dispute falls into, before proceeding with the merits of the jurisdictional dispute. Although counsel states that there is no impediment to the Board deciding the sector issue in the course of the consultation on the complaint, he indicates that if the Board determines the work to be in other than the ICI sector, the companies will likely withdraw their participation in the proceedings. The Labourers and the Carpenters both urge the Board to deal with the sector issue in the course of dealing with the merits of this complaint. We see no compelling reason in this case to separate the issues for determination. If in the course of making our determinations on the complaint, this panel is required to determine whether the work in dispute is governed by the agreement between the Carpenters and the Labourers, and the resolution of this issue requires a determination as to which sector the work belongs to for the purposes of that agreement, then we will deal with this issue in the course of dealing with the complaint.

Additional Filings

31. The Carpenters request an order that the complainants and the Labourers file a further, more detailed description of the work in dispute. We do not view this as necessary. The jurisdictional dispute commenced with the Carpenters' grievances. Although the parties may not be able to *agree* on a description of the work in dispute, the Carpenters in our view are not prejudiced in their ability to file a response by the manner in which the work has been described thus far by the other parties. However, we will direct the companies to file any drawings, pictures or diagrams relevant to the issues and to which they have access, in order to assist the Carpenters in framing their description of the work in dispute.

32. The Labourers are also directed to state all of the facts on which they will rely in support of their position that the work in dispute is in the landscaping sector and is therefore not covered by the agreement with the Carpenters, and to file copies of any documents on which they will rely in this matter.

33. In the circumstances of this case, the Carpenters will be given the opportunity to file further materials in response to the complaint and the reply by the Labourers, and the applicants will also have an opportunity to address the "sector issue" once it has been particularized by the Labourers.

Procedural Rulings

34. This matter is scheduled for consultation before the Board on May 18th, 1993 at the Board's Offices, 6th Floor, 400 University Avenue, Toronto, Ontario, commencing at 9:30 in the forenoon (local time).
35. The applicants are directed to file the materials described above on or before March 12th.
36. The Labourers are directed to file the materials described above on or before March 26th.
37. If the applicants wish to take a position with respect to the "sector issue", they are directed to file a statement of the facts as well as copies of any documents upon which they rely, on or before April 9th.
38. The Carpenters are directed to file the materials required by the Board's Rules of Procedure respecting jurisdictional disputes, on or before April 30th.
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1227-89-G International Brotherhood of Electrical Workers, Local 353, Applicant and v. Honeywell Limited, Respondent

Construction Industry - Construction Industry Grievance - Union grieving alleged violation of ICI agreement during commissioning phase of EMS and Fire Alarm System at hospital project - Board concluding that commissioning of a system or facility, including the software, is construction work - Any work performed during commissioning phase falling within jurisdiction of IBEW - Grievance allowed

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *A. M. Minsky* and *Bill Robinson* for the applicant; *Barry Brown*, *John Kennedy*, *M. T. deCoeli*, *Jim Bull* and *Paul Birosall* for the respondent.

DECISION OF THE BOARD; February 19, 1993

1. The applicant has referred a grievance in the construction industry concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 126 [formerly section 124] of the *Labour Relations Act*.
2. The grievance alleges violation of section 200, 505 and 700 of the Principal Agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario ("ETBA") and the International Brotherhood of Electrical Workers ("IBEW") and The IBEW Construction Council of Ontario ("IBEW CCO"). Section 200, 505 and 700 read as follows:

200 UNION JURISDICTION

The Contractor agrees to recognize the inside and outside jurisdictions as outlined in the Consti-

tution of the IBEW in the performance of all electrical work performed within the geographic jurisdiction of the Union as hereinafter defined.

Inside Work

All electrical signs, all street electrical decorations when no messenger or guy wire is necessary for support. Installation, construction, inspection, operation, maintenance and repair of all electrical work in isolated plants and within property lines of any given property and beginning at the secondary side of the towers, including wires or cables and other apparatus supported therefrom and except all outdoor substations as defined in Outside Work hereof.

When aerial wires or cables are used to provide electric current for buildings or structures within the property lines of any given property the inside men's jurisdiction shall start immediately after the first point of attachment of such aerial wires or cables to such buildings or structures.

505 SUBCONTRACTING

The Company shall not directly or indirectly sublet any work under the jurisdiction of this Agreement to any other Employer or Employee who is not a party to an IBEW Construction Agreement nor require any employee to work on a piecework basis.

700 HIRING PROCEDURE

The Contractor agrees to hire and employ only members of the International Brotherhood of Electrical Workers on all electrical work. The Contractor shall have the right to select and name-hire all Foremen. When making appointments to the Foreman level, the employers will give consideration to those Journeymen they presently employ. All hiring will be done through the Local Union Office and no one will be employed unless they are in possession of a clearance card from the Local Union Office.

3. It is alleged that the respondent employed non-union members to perform work covered by the provincial agreement without union clearance. The work giving rise to this grievance was performed at the Markham-Stouffville Hospital Project. Honeywell was a subcontractor to Ellis Don on the Markham project. It involves the installation and programming of programmable controllers for the environmental control system and fire and smoke alarm systems at the Markham-Stouffville Hospital. Part of the work involves the programming and insertion of EPROMS which is an acronym for "Erasable Programmable Read Only Memory" in connection with the Environment Management System. (EMS)

4. During the twenty days that were devoted to hearing evidence and argument regarding this matter the Board heard extensive testimony from thirteen witnesses. A total of seventy-three Exhibits were put before the Board. The proceeding took from January of 1990 to January of 1991 to complete.

5. A number of documents were put before the Board on agreement of the parties. It is further agreed that the applicant and respondent are bound to the ICI agreement (Exhibit 1); that the respondent is named on Schedule F of the accreditation order; that the July 20 grievance is arbitrable and there is no objection to the Board's jurisdiction to hear this grievance.

6. At the first day of hearing, January 24, 1990 Honeywell agreed it was bound to the ICI agreement but took the position that the work which gave rise to the grievance is not covered by the ICI agreement. By letter dated May 10, 1990 (and after six days of hearing) the respondent advised the applicant that while it signed a voluntary recognition agreement in June of 1988 it did not bind Honeywell in all sectors because of alleged misrepresentations by the union official.

7. The Board heard the evidence of Mrs. Jo-Anne MacEachern, who has been employed

as Secretary to the Business Manager of IBEW Local 120 for fourteen years. Mrs. MacEachern testified that she signed Exhibit 46 on behalf of the union. Exhibit 46 is the voluntary recognition agreement signed by Michael W. Frijters as the "Authorized Representative" of the respondent. The document is dated June 16, 1988 and reads as follows:

2001 NEW SIGNATORIES - Voluntary Recognition Agreement

To Whom It May Concern:

This will acknowledge receipt of a copy of the Principal Agreement and Local Union Appendices covering all Electrical Work as agreed to by the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario representing the following affiliated Local Unions, 105, 115, 120, 303, 353, 402, 530, 586, 594, 773, 804, 894, 1687 and 1739. This Agreement became effective on May 28, 1986 and will expire on April 30, 1988.

We have examined this Agreement and the firm I represent agrees to comply with the hours, wages and conditions of employment as set forth therein. The affixing of my signature to this Voluntary Recognition Agreement shall be as binding on the firm I represent as though my signature was affixed to the Principal Agreement, Local Appendices and applicable Amendments thereto.

We further agree that any renewal or revision thereof negotiated between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario, will be binding upon both of the parties signatory to this Voluntary Recognition Agreement.

This understanding shall become effective on June 20, 1988, and remain in effect from year to year thereafter, or until notice to terminate is given under provisions of Section 3 of the said Agreement.

SIGNED this 16 day of June, 1988, in London, Ontario.

SIGNED FOR THE CONTRACTOR:

Honeywell Limited

Registered Name of Company

"Michael W. Frijters"

Signature of Authorized Representative

555 Consortium Court

London, Ontario

N6E 2S6 (519) 685-2010

Company Address and Telephone Number

SIGNED FOR THE UNION:

LOCAL UNION NO. 120, of the International
Brotherhood of Electrical Workers.

"John D. Pender, Business Manager"

Signature of Authorized Representative

8. Mrs. MacEachern prepared the document by typing in the appropriate information prior to Mr. Frijters' arrival. She witnessed his signature and signed for John Pender, the Business Manager. Mrs. MacEachern understood from Mr. Pender that Mike Frijters would come in to the office to sign the voluntary recognition. John Pender was out of the office at the time of signing. The signing took five to ten minutes. Mr. Frijters received an information package including a

sample remittance form for benefit contributions and a wage schedule for the payroll office. When the new collective agreements were printed Mrs. MacEachern gave a copy to Martin Amos, the Foreman on the Honeywell job.

9. Martin Amos and Ed Baker, an apprentice, were dispatched by Local 120 to the respondent's job site pursuant to the collective agreement. They were still at work at the time of this proceeding. Benefit contributions have been made in accordance with the agreement. In the fall of 1989 three members were dispatched to the respondent's job site pursuant to the collective agreement.

10. John Pender, Business Manager of Local 120, testified that in May or June of 1988 Mike Frijters contacted him regarding Martin Amos. Honeywell was familiar with Amos' work and wanted to hire him. There were some discussions about signing an agreement with Local 120 and that Amos could work as well under the Sarnia agreement. Arrangements were made for Mr. Frijters to sign the agreement. It was the practice for the Secretary to sign for Mr. Pender in his absence. At no time, according to Mr. Pender, was there any suggestion by Honeywell that the agreement was not valid or enforceable.

11. Pender testified that Honeywell used the services of a union subcontractor with an agreement with the IBEW. Martin Amos worked for that subcontractor. That is how Honeywell became aware of Mr. Amos and wanted to hire him directly. Pender advised Frijters if he wanted to hire Martin he would have to sign an agreement as there was none on file with the IBEW in London. Pender was not aware if Honeywell was already bound to the provincial agreement. Pender's evidence is that if a contractor wants members of his local he asks them to sign a voluntary recognition agreement. There was no discussion as to whether Honeywell was already bound. No discussion took place with respect to the consequences of signing the voluntary recognition agreement as to the scope of the collective agreement which includes service and maintenance work. There was discussion about the mobility of IBEW members. It was Pender's impression that the respondent was aware of the various provisions of the collective agreement. No collective agreement was sent to the respondent.

12. Mr. Pender was cross examined extensively on what he told Mr. Frijters during the discussions leading up to the signing of the voluntary recognition agreement. No specific allegation was put to Mr. Pender. General questions such as "Why don't you tell us everything you told him about signing this agreement?" were put to Pender.

13. When the respondent called its witnesses it put certain questions to Mr. Frijters objected to by the applicant. Counsel for the applicant objected to the evidence as it contradicted Mr. Pender's evidence. Counsel contends it should have been put to Mr. Pender when he was cross examined that Mr. Frijters' evidence would be that he did not speak to him, citing the rule *Browne v. Dunn*. The issue of the voluntary recognition agreement was raised May 3 and 10. Mr. Pender testified June 5. The position taken by the respondent May 10 was that there was some misrepresentation by the union official. No questions about any misrepresentations were put to Pender or MacEachern in their cross examination.

14. Counsel for the respondent submits *Browne and Dunn* is not a rule to exclude evidence. The issue is "has Mr. Pender been treated fairly at the end of the day, not should the Board refuse to hear some fact." It has been the respondent's position from the beginning that this voluntary recognition agreement is not valid because of the circumstances surrounding the signing. Whether the misrepresentations were made by Mr. Pender or his Secretary has no effect on the material misrepresentations made to Mr. Frijters. Little turns on whether it was Mr. Pender or his Secretary

who told Mr. Frijters what the effect of the agreement would be. What is important is the nature of the misrepresentation.

15. Counsel for the respondent submits at the time of cross examining Mr. Pender he was not aware there was a discrepancy over who verbalized the misrepresentation. The content of the misrepresentation was put to Mr. Pender. Mr. Pender can be called in reply, if there is any unfairness to Mr. Pender, to give his explanation. The "rule" speaks to fairness to Mr. Pender not to whether parties are allowed to call evidence.

16. The Board after considering the parties submissions made the following oral ruling on December 13, 1990:

"The respondent had ample opportunity to put questions to Mr. Pender and Mrs. MacEachern with respect to the circumstances surrounding the signing of Exhibit 46.

The alleged misrepresentation was raised by the respondent. It is the respondent who is in possession of the facts surrounding the circumstances of the signing of this document and whatever conversations took place with whatever union official prior to the signing.

The respondent cannot now put evidence before the Board that contradicts Pender and MacEachern without having put those witnesses on notice. None of us can recall any such questions but we have not reviewed all the evidence. Unless the respondent can point to any questions put to MacEachern and Pender putting them on notice that their evidence would be contradicted we will not allow the questions.

These witnesses have been deprived of the opportunity to explain why their version of events may be different at the time of giving their evidence. This is not the same as recalling them to give explanations after this witness has testified."

17. The respondent, in light of the Board's ruling, requested the Board to strike Frijters evidence from the record and withdrew the witness.

18. Counsel for the applicant submits that the evidence shows the work associated with the construction of the systems, the fire alarm system and the environmental control system, was performed contrary to the collective agreement. It is construction work within the ICI sector. There are two contracts for the supply, installation and construction of two automated computer based control systems, one environmental and one for the fire alarm system.

19. Counsel submits the work in question is construction work and is covered by the provincial agreement. Members of 353 were on the site working under the collective agreement at all material times. The applicant's position is that all of the work in question, described by the respondent as "commissioning work" is electrical construction work under the ICI agreement.

20. The applicant concedes for the purposes of this case certain work is an exception. The software programming requiring Pascal language (a high level computer language) is an exception. The applicant does not claim, for the purpose of this case, the creation, designing or writing of the Pascal software program or modification to it. It is the applicant's position however that they claim everything else done on a non-union basis on these two systems.

21. The applicant submits the work is covered by the provincial agreement whether it is found to be construction or non-construction. However the applicant's position is that it is ICI construction work which was performed by David Chow, technicians and engineering students from the University of Waterloo.

22. Daniel Chow, who developed the software, did not testify. The applicant asks the

Board to draw some adverse inference that Daniel Chow and other Honeywell employees did not testify with respect to the deployment of the technicians also referred to as “techs”.

23. The applicant contends the respondent unilaterally decided that certain final phases of its work including the final testing of equipment or devices or installation of certain devices or performance of certain checks were not electrical work and/or not construction work and therefore can be performed outside the provincial agreement by non-union techs. This case is not about repair or maintenance. This is the installation of a new system in a new building. The applicant does not agree with the respondent's position that the commissioning of the system is non-construction.

24. Counsel submits a significant number of the continuity checks were done by the techs. This is routine electricians work using multi-meters. The applicant claims the simulation, testing or checking out of equipment or process by means of a Portable Programmable Terminal (PPT) or lap top computer, where Pascal is neither required nor used. Routine trouble shooting or simulating to see if equipment is operating properly, sequentially, is part and parcel of checking out the system. The applicant claims all work performed at the site by non-union persons except that work which involves or requires the user to know high level computer language such as Pascal. The applicant requests the Board declare the work that is the subject matter of this grievance, performed on a non-union basis, in connection with the environmental control and fire alarm systems at Markham-Stouffville Hospital, is covered by the principal agreement and that Honeywell has violated the agreement. The applicant requests a cease and desist order and asks the Board to remain seized on quantum of damages. The applicant further requests a declaration that the respondent is bound to the principal agreement for construction and non-construction work. For the grievances, Exhibit 4 and Exhibit 7, the applicant is requesting only declaratory relief.

25. The respondent submits there are three areas:

- 1) the applicability of the collective agreement - the extent to which the respondent is bound by the provincial agreement;
- 2) the nature of the work in dispute in this proceeding, work that was performed at Markham-Stouffville Hospital done by other than 353 members and whether the performance of that work constituted a breach of the collective agreement;
- 3) if you find there has been a breach what would be the appropriate remedy.

26. The respondent accepts it is bound by the provincial collective agreement for electrical construction work in the ICI sector. The issue becomes whether the work in dispute is covered by the agreement. It is not disputed that the work is neither residential nor service work. The respondent takes the position that it is not necessary for the Board to make a finding whether the respondent is bound to the agreement for other than ICI. Those issues do not arise in this case.

27. The respondent submits the work in question is “computer software work” and not “construction work”. It is agreed that the provincial agreement applies to the physical installation of the two systems at the Markham-Stouffville Hospital and that work was performed by members of 353 pursuant to the collective agreement.

28. The issue in the respondent's view is whether the particular work in dispute is part of the physical installation of the system or whether it is part of the creation, testing and commission-

ing of the software program. The respondent submits that the disputed work is part of the commissioning of the software and not work within the jurisdiction of the IBEW. The respondent submits there is no evidence before the Board with respect to residential or service work. It is not material to the issue before the Board.

29. Counsel for the respondent submits the applicant did not state what inference the Board should draw with respect to the Honeywell employees who did not testify. The onus is on the applicant to prove its case. There is no onus on the respondent to prove anything, no onus to prove what the techs did. The respondent submits with the exception of a dispute involving Mr. Heenan there is very little in dispute over who did what work. Mr. Heenan, a member of the union and the Foreman on the job was not called by the applicant and it is the respondent's position the Board should infer that Heenan's evidence would have been against the interest of the applicant.

30. The respondent submits the work in dispute is the commissioning of the software which is not in the exclusive jurisdiction of the IBEW and is not construction, it is software work. It is part of the programming, creation and modification process not claimed by the IBEW. Is the work in dispute part of the installation of the hardware or physical devices or is it part of the checking out or modification of the software? The evidence establishes that none of the IBEW members are able to work with high level computer languages such as Pascal. Pascal was the language used at the Markham-Stouffville Hospital Project. The software was developed for this particular project including the computer centre that would co-ordinate the program.

31. The respondent takes the position that it is necessary to field test the program or software and make changes as needed however this can only be done by someone familiar with Pascal. If in the commissioning of the software a problem in the equipment is discovered that problem would be referred to members of Local 353 to correct.

32. It is the respondent's submission that all the work in dispute at the face of the panels or programmable controllers for both the Fire Alarm System and the Environment Management System is part of the verification of the software program and as such is not electrical construction work.

33. The respondent argues that the specific tasks claimed by the IBEW do not constitute construction work but are part of the commissioning of the software. The insertion of the EPROMS is no different than inserting or removing a diskette from a personal computer. As the program is checked or modified the EPROMS have to be removed, checked and replaced. The plugging in of the Phoenix connectors is no different from plugging in any other electrical device or can be compared to connecting a personal computer to a printer. It is important to plug in the Phoenix connectors sequentially and verify that the software is working in the correct sequence.

34. Kennedy's evidence is that in his experience when the techs arrive to load and commission the software that 353 members will have completed the continuity checks and the system is free of shorts, opens or grounds. The respondent submits the evidence shows that Vanderkolff did not know who completed the continuity checks on the fire alarm after he left the site. There is no evidence from Vanderkolff that other than 353 members performed continuity checks.

35. It is the respondent's position that the entire system has been completely checked out at the time of loading the software. If the software techs conduct another continuity check, whether this is the third or fourth check, for his own piece of mind, it does not in any way detract from Local 353's jurisdiction. The tech is not doing the work in place of the electrician but in addition to.

36. "Calibration of field sensors" is a misnomer. The calibration is performed by the computer software using Pascal. Some of the evidence referred to calibrating field sensors by using a screw driver, turning the screw depending on whether the reading was too low or too high. This is not the case here. It is a software task requiring the change in the software using Pascal.

37. The respondent submits the task involving the use of fuses in the panel as on/off switch by the techs is no different than turning a light on or off. This action of turning on the power at the panel is not electrical construction work.

38. The removing of the covers from the panels was necessary for the technician to attach his lap top, insert the EPROM and commission the software.

39. With respect to the continuity checks performed at the Motor Control Centre ("MCC") there is no evidence that any continuity checks were performed at the MCC by techs. The respondent submits Chow was showing the techs around the MCC.

40. The respondent submits the evidence is clear that all of the work at the face of the panel with portable computers involved the use of Pascal and requires a person knowledgeable in Pascal in order to check or alter the program.

41. With respect to the insertion of the circuit Boards in the fire alarm system this is equivalent to the EPROMS in the EMS. The continuity checks are the same as performed in the EMS. This a software task. It is the respondent's position that the construction work performed on the fire alarm system was done by members of 353. The verification of the software is not part of construction work. The use of magnets to trip the fire alarm is a requirement by the Fire Marshall and has nothing to do with the construction on installation of those devices.

42. Counsel for the respondent submits the evidence with respect to training of IBEW members is irrelevant as it does not include equipment used by Honeywell.

43. It is the respondent's submission that the work performed by Daniel Chow, the techs and the students, claimed by the applicant, is not part of the construction or installation of an electrical system. It is not electrical construction work, it is part of the creation, testing or modification of a software program. In the exercise and change of the software there may be incidental tasks such as opening doors of panels or turning panels on. This is analogous to IBM employees loading software into computers installed by electricians. The loading of software would include turning computers on and off. Each of the panels is a computer and are turned on by inserting the fuse or plugging in the phoenix connector. This is not electrical construction work within the jurisdiction of the IBEW.

44. The respondent submits the grievance should be dismissed because it has been established that none of the work has been performed in such a fashion that its performance breached the collective agreement.

45. In the alternative if the Board finds some of the work in dispute should have been performed by members of the IBEW there is the issue of appropriate remedy. The respondent submits there is no evidence of IBEW members being available to do the work and the only evidence is from Bill Robinson that there was full employment in the Local at the relevant time. In the circumstances the only remedy is a declaration that there was a breach.

Decision

46. The Board has weighed and assessed the testimony in the context of the documentary material filed with the Board. Both counsel concisely reviewed the evidence in support of their respective assertions and the relevant jurisprudence.

47. The work that gave rise to the dispute involves the commissioning of the Environmental Control and Fire Alarm Systems at the Markham-Stouffville Hospital. This work included the installation or removing and re-installing on site of EPROMS in the programmable controllers. The disputed work involved the plugging in or pushing in of Phoenix Connectors, continuity checks performed at the panel using Ohm Meters or Multi Meter to check for opens or grounds, the calibration of field sensors performed at the face of the controller, the removing of fuses, to switch the power on and off.

48. There was some evidence that techs had removed the covers of panels or controllers and performed continuity checks. These were high voltage panels and Ellis Don requested Honeywell cease "installing electrical components and checking for wiring continuity" (see Exhibit 24) until the Ellis Don Labour Relations Manager could investigate and rule on the IBEW request. One PC was installed by the techs in error. The respondent concedes it should have been done by the IBEW.

49. The IBEW claims that bargaining unit work was performed by non-union personnel in the following areas:

- (1) EPROMS
- (2) Phoenix Connectors
- (3) Continuity Checks
- (4) Calibration of Field Sensors
- (5) Fuses (using them as off/on switches)
- (6) Removing Covers from Control Panels
- (7) Continuity Checks performed at MCC (Motor Control Centre) high voltage (Exhibit 24) 600 volts
- (8) Installation of a Control Panel
- (9) Programming (other than high level computer language i.e. Pascal)
- (10) Fire Alarm System

50. The respondent characterized the work as having two parts. One part involves the designing, creating and commissioning, including modification of the computer software needed to run the two control systems. Each software is unique to each project developed by a software expert working from the requirements set out by the consulting engineer. The 2nd part is the actual wiring and installation of the various physical devices. These include the control panels which house the control devices, the remote sensors, to regulate the humidity and temperature, and the fire alarm sensors.

51. The commissioning of the systems involves the checking out of the physical components and the software. There is no disagreement that the installation or construction of the physical components is construction work covered by the ICI agreement. The dispute is whether the commissioning of the software is construction work. If the answer is yes then its covered by the ICI provisions of the agreement. The respondent takes the position that the commissioning of the software is a separate process from the commissioning of the hardware, and is not covered by the collective agreement.

52. It is our view that commissioning of a system or facility is construction work. When a system or systems are turned over to the owner it is reasonable to expect that the systems are working and performing the tasks for which they have been designed. The hardware and the software are designed to function as a complete system. The commissioning of the systems is part of the construction phase. This is separate from the design or creation of the software which is not part of the construction phase. Any work performed during the commissioning phase of these two systems, regardless of how minor, or if it is the second or third continuity check, is work within the jurisdiction of the applicant.

53. The applicant has requested an all encompassing declaration for all non-construction and construction work. Having considered all of the submissions we are not prepared to give such a wide declaration. The grievance arose in the ICI sector and the Board declares that the work at issue (with the exception of work using Pascal) is covered by the ICI provisions of the agreement. For the purposes of this case the applicant does not claim any work functions performed during the commissioning phase using Pascal. We find there has been a violation of the ICI provisions of the collective agreement during the commissioning phase of the EMS and the Fire Alarm System at the Markham-Stouffville Hospital Project.

54. The Board directs the parties to meet to resolve the issue of damages. The Board will remain seized on quantum of damages should the parties be unable to agree.

2957-92-R; 3183-92-G; 3221-92-G; 3222-92-G; 3223-92-R; 3287-92-G; 3288-92-G; 3289-92-G Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891, Applicant v. Malvern Drywall Systems Ltd. and 950337 Ontario Inc. c.o.b. as **Lakeridge Acoustics**, Responding Parties; Drywall Acoustic Lathing and Insulation Local 675, Applicant v. 950337 Ontario Inc. c.o.b. as Lakeridge Acoustics, Responding Party; Drywall Acoustic Lathing and Insulation Local 675, Applicant v. Malvern Drywall Systems Ltd., Responding Party; Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America, Applicant v. Malvern Drywall Systems Ltd. and 950337 Ontario Inc. c.o.b. as Lakeridge Acoustics, Responding Parties

Construction Industry - Construction Industry Grievance - Practice and Procedure - Related Employer - Remedies - Responding parties not filing response to application, nor appearing at hearing - Board issuing declaration on the basis of material filed by the union indicating related activities under common control - Board's Rule 19 also permitting Board to deem responding parties to have accepted all facts in the application when responding parties do not file responses as required by the Rules - Related employer liable to pay outstanding amounts under settlement and Board order in previous grievance referral - Board allowing grievance alleging failure to make remittances and awarding damages against both responding parties

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members G. O. Shamanski and J. Redshaw.

APPEARANCES: L. Steinberg and A. Neil for Ontario Council of the International Brotherhood of

Painters and Allied Trades, Local Union 1891; *M. Pollock* and *Helmut Redermeier* for Drywall Acoustic Lathing and Insulation Local 675; no one appearing for the responding parties.

DECISION OF THE BOARD; February 24, 1993

1. These eight files are related matters which were listed together at the request of the applicants. Files 2957-92-R and 3223-92-R are similar requests for declarations under sections 64 and 1(4) of the Act. The remaining files are referrals of grievances in the construction industry for arbitration under section 126 of *Labour Relations Act*. For convenience, the applicants will be referred to as the Painters and the Drywallers.

2. No one appeared on behalf of the responding parties within one-half hour of the appointed time for the start of the hearing. Both the Painters and the Drywallers wished to proceed on the applications under section 64 and 1(4) of the Act, and the Painters wished to proceed with their referrals to arbitration in files 3183-92-G and 3287-92-G.

3. It appeared that notice had been given in the normal manner by the Registrar to the responding parties. Mail addressed to Malvern Drywall Systems Ltd. (referred to below simply as Malvern) at the addresses provided by the applicants was returned undelivered to the Board. However, it is evident that notices of the same material sent to 950337 Ontario Inc. c.o.b. as Lakeridge Acoustics, (referred to below as Lakeridge) were received. Materials sent to both Malvern and Lakeridge were sent to the attention of Mr. Aurele Belair, the common principal of both responding parties.

4. Correspondence was received from Mr. Belair on February 2, 1993 as follows:

Please be advised that Lakeridge Acoustics is a separate company which as no employees and never had. The only work that has been done has been by myself and sometimes with the help of my son. I have not done any work for the last six months.

Also please be advised that I have never met [or] discussed any settlement with any body. The Painters union were notified that Malvern Drywall had been closed down by the Bank. Also please be advised that Lakeridge has never worked in St. Catharines. So who ever is giving you the information is totally wrong.

Thus, it is clear that Mr. Belair purports to have knowledge of both responding parties and that he is aware of proceedings before the Board relating to both or he would not have written the Board. In the circumstances, although the material addressed to Mr. Belair for Malvern was returned, we are satisfied that the same material, addressed to him for Lakeridge, was received by him. In the circumstances we find Malvern had actual notice of these proceedings through the material addressed to Lakeridge. The material indicates there are no employees of Malvern or Lakeridge to whom notice could be given.

5. The notices of hearing clearly state the following in paragraph 3:

IF YOU DO NOT ATTEND THE HEARING, THE BOARD MAY DECIDE THE APPLICATION WITHOUT FURTHER NOTICE TO YOU AND WITHOUT CONSIDERING ANY DOCUMENT FILED BY YOU.

Accordingly, we proceeded to hear the matters the applicants requested we deal with.

6. The material before the Board indicates a sound basis for a declaration under section 1(4) of the Act and we ruled orally that we would grant the requested declaration. Although the applicants also submitted that the facts would support a declaration under section 64, they each

indicated that a declaration under section 1(4) would suffice. Thus, it is not necessary to rule on the section 64 application.

7. Section 1(4) reads as follows:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

8. The material indicates that the activities of both the responding parties are related. Malvern's full name indicates its business relates to drywall systems. Lakeridge's registration of its business style under the *Business Names Act* indicates the activity carried on as "drywall and acoustics". Although Mr. Belair's letter indicates that these activities were not carried on by both entities during the same time period, the statute specifically states the section applies whether or not carried on simultaneously.

9. The material further indicates the two businesses are under common control and direction. Malvern's last filing under the *Corporations Information Act* in 1984 indicates that Aurele Belair is President and a Director of Malvern. Lakeridge's filing under the same Act in 1991 indicates the numbered company was incorporated on November 8, 1991 and that the sole Director and President is Aurele Normand Belair. Although not in technical language, the letter sent to the Board by Mr. Belair indicates general knowledge of the activities of both, and specifically of work done for Lakeridge.

10. Although the above is sufficient basis for the declaration, the application of Rules 14 and 19 also support the declaration sought. Rules 14 and 19 provide as follows:

14. Any response filed with the Board must include the following details:

- a) the full name, address, telephone number and facsimile number (if any) of the responding party, of a contract person for the responding party and of any other person who may be affected by the application;
- b) a statement of agreement or disagreement with each fact or allegation in the application;
- c) a statement of the responding party's position with respect to the orders or remedies requested by the other parties;
- d) where the responding party relies on a version of the facts different from the applicant's a detailed statement of all material facts on which the responding party relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.

...

19. If a party receiving notice of an application does not file a response in the way required by these Rules, he or she may be deemed to have accepted all of the facts stated in the application, and the Board may decide the case upon the material before it without further notice.

The letter from Mr. Belair does not dispute anything in the applications which refer to the related-

ness of the activities of the respondents nor the common direction and control of Mr. Belair. Thus, he may be deemed to have admitted those facts.

11. There is no reason before us to refuse the declaration sought and sufficient basis in the material before us to do so. Thus, we hereby exercise our discretion and declare that the responding parties are to be treated as one employer for the purposes of the Act pursuant to section 1(4).

12. Counsel for the Drywallers filed documents related to Board File 2377-91-G being a memorandum of Agreement dated October 31, 1991 in which Mr. Belair agreed on behalf of Malvern to pay \$12,143.70 in settlement for breaches of the collective agreement to which Malvern and the applicant were bound. A decision of the Board dated November 26, 1991 ordered Malvern to pay the same amount for the same collective agreement breach. We are advised that the amount has not been paid. The application in Board file 3233-92-R included a request for an order that the respondents pay full compensation to the applicant. We were referred to *Golden Arm Flooring Inc.*, [1992] OLRB Rep. June 731 where the Board granted a section 1(4) declaration and included as part of the relief a direction for the respondent to pay any unsatisfied damages arising out of a previous Board order.

13. The effect of the section 1(4) declaration is to treat both respondents as one entity. Thus Lakeridge is also bound to the collective agreement to which the Drywallers and Malvern were bound. As a consequence, Lakeridge is also liable to pay the amounts outstanding under the previous settlement and Board order in Board file 2377-91-G. There is no reason before us to limit the application of our declaration to obligations incurred after Lakeridge's incorporation, and we decline to do so.

14. The Drywallers requested that their referrals to arbitration in files 3221-92-G, 3222-92-G, 3288-92-G and 3289-92-G be adjourned. Having regard to that request and the absence of the employer, those matters are hereby adjourned sine die for a period not to exceed one year. If the Board does not receive a written request for a hearing within that one-year period, and the matter is not otherwise disposed of by the Board, those matters will be dismissed. Since three of those files had not been fully processed, being files 3222-92-G, 3288-92-G and 3289-92-G, if they are revived they will have to be processed at that time.

15. The Painters asked us to consider their referrals to arbitration in Board files 3183-92-G and 3287-92-G. They are identical with the exception of the reference to the duration of the collective agreement. Board file 3287-92-G has not been fully processed and will be considered adjourned sine die under the same terms as the files referred to in paragraph 14 which were not fully processed.

16. The Painters and Malvern are bound by the provincial collective agreement between the Ontario Painting Contractors Association, Acoustical Association Ontario, Interior Systems Contractors Association of Ontario and the Painters. The grievance referred for arbitration in file 3183-92-G refers to several matters, most specifically the non-payment of required contributions, deductions and remittances under that collective agreement. The applicant asks for an order for the amount of \$6,326.22 in respect of these claims. This number is derived from remittance sheets filed by Malvern in respect of employees understood by the applicant and its Administrator T. Neal to have worked for Malvern during the time covered by the forms, July through October, 1991. The remittance forms were sent to the benefit plan's administrator without any payment. They were then forwarded to the applicant because there was no accompanying payment and a grievance was filed.

17. We find that the remittance forms amount to an admission by Malvern that it owes the

amounts listed there. Pursuant to the section 1(4) declaration, Lakeridge is also bound to the collective agreement to which the Painters and Malvern were bound. Therefore we find that both Malvern and Lakeridge owe the painters \$6,326.22 for the categories of remittances set out on their Employer's Contribution Report forms it filed for the months of July, August, September and October, 1991.

18. In summary then, the applications in files 2957-92-R, 3183-92-G and 3223-92-R are granted. Files 3221-92-G, 3222-92-G, 3287-92-G, 3288-92-G and 3289-92-G are adjourned sine die as set out in paragraphs 14 and 15. Malvern and Lakeridge are ordered to pay the Painters \$6,326.22 as set out in paragraph 17. Malvern and Lakeridge are ordered to pay the Drywallers \$12,143.70 as set out in paragraphs 12 and 13, less any amounts previously paid in satisfaction of the Board's order in Board File 2377-91-G.

2180-92-U Ontario Public school Teachers' Federation, Applicant v. Leeds and Grenville County Board of Education, Responding Party

Change in Working Conditions - School Board and Teachers Collective Negotiations Act - Unfair Labour Practice - Whether wages and benefits paid to certain employees in bargaining unit constituting contravention of statutory freeze - Board rejecting argument that grievors were statutory form teachers and not occasional teachers within unit applied for - Employer's alteration of those teachers' terms and conditions violating the Act - Complaint allowed and compensation ordered

BEFORE: Susan Tacon, Vice-Chair, and Board Members G. O. Shamanski and P. V. Grasso.

APPEARANCES: L. A. Richmond, M. Glassford, H. Vigoda and R. Frith for the applicant; Barry Brown and Joe McKeown for the responding party.

DECISION OF THE BOARD; February 5, 1993

1. This is an application pursuant to section 91 of the *Labour Relations Act*. As initially filed, the application alleged contravention of a number of sections of the Act. At the hearing, it was apparent that the gravamen of the application was an alleged violation of the statutory freeze provision, namely, section 81 [formerly section 79]. Argument was restricted to that section. What is at issue is whether the wages and benefits paid to certain of the employees in the bargaining unit constitutes a contravention of the freeze.

2. There is no dispute that the statutory freeze was in force at all material times. Nor is there a dispute that the grievors are currently employees in the bargaining unit represented by the applicant. The parties reached agreement on the further facts relevant to this application. It is useful to set out that agreement in full at this juncture:

STATEMENT OF AGREED FACTS

1. The Ontario Public School Teachers' Federation (hereinafter referred to as the Complainant Union) represents occasional teachers employed by the Leeds and Grenville County Board of Education (hereinafter referred to as the Respondent).

2. The Complainant Union was certified by the OLRB as bargaining agent for “all occasional teachers employed by the Leeds and Grenville County Board of Education in its elementary schools in the Leeds and Grenville County, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*”. Copies of the certificate issued by the Board and of the Board’s decision are attached as Exhibit 1.
3. Paragraph 1(1)31 of the *Education Act* defines “occasional teacher” as follows:

“‘Occasional Teacher’ means a teacher employed to teach as a substitute for permanent, probationary, continuing education teacher or temporary teacher who has died during the school year or who was absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year.”

The *Labour Relations Act* applies to occasional teachers. Collective bargaining with respect to statutory contract teachers is governed by the *School Boards and Teachers Collective Negotiations Act*. Teachers employed on statutory form contracts are not covered by the certificate issued to the Complainant Union.

4. The statutory form contract teachers employed by the Respondent in its elementary schools are represented by the Complainant Union and by the Federation of Women Teachers’ Association of Ontario. The current collective agreement, with a term of September 1, 1991 to August 31, 1993, is attached as Exhibit 2.
5. Article 13.10 of Exhibit 2 provides as follows:

“13.10 Occasional Teacher

- (a) Where it is anticipated that a qualified teacher must be employed in excess of thirty (30) consecutive teaching days to replace another teacher on contract, the qualified teacher shall sign an open-ended terminal contract to extend over a mutually agreed-upon time. She shall be entitled to all benefits applying to members covered by this Agreement from the date the contract is executed by the Board and shall be entitled to salary in accordance with her appropriate grid position, having regard to her qualifications and recognized experience, retroactive to the first day of teaching.
- (b) A qualified teacher who is employed as an occasional teacher as defined in the Education Act, shall be paid at the rate, which shall be deemed to include allowance for vacation pay, established by the Board from time to time for the first twenty (20) consecutive teaching days. On the twenty-first (21st) consecutive teaching day, and thereafter until completion of the occasional teacher assignment, such occasional teacher shall be paid at the rate, which shall be deemed to include allowance for vacation pay, established by her qualifications and recognized experience in relation to the salary grid. An occasional teacher shall not be given a teaching contract nor shall she be entitled to participate in any benefit plan as provided in Article XI hereof nor to accumulate credit for sick leave or seniority purposes.
- (c) Teachers who are on leaves of absence or who teach part time may be hired by the Board as occasional teachers and shall be subject to the above provisions.

NOTES:

1. An open-ended terminal contract means a contract to extend to the end of

the school year or until the teacher being replaced returns to duty, if such return is before the end of the school year.

2. The teacher being replaced by a qualified occasional teacher who has signed an open-ended terminal contract shall notify her Principal one full teaching day in advance of the date on which she intends to return to duty.
3. In the event that occasional teachers as that term is defined in the Education Act should acquire collective bargaining rights under the Labour Relations Act of Ontario, this Article shall be deemed to be null and void as of the date on which such collective bargaining rights are required. [sic]
6. Prior to the certification of the Complainant Union as bargaining agent of occasional teachers employed by the Respondent, where it was anticipated that a "replacement" teacher would be hired for more than thirty (30) days, as was the case with the grievors, they signed Exhibits 3 and 4 (as amended by their individual circumstances) and received all the benefits applying to members covered by the collective agreement (Exhibit 2) and received salary in accordance with their qualifications or recognized experience retroactive to the first day of teaching as set out in 13.10(a) of Exhibit 2. Union dues were levied and paid in accordance with Exhibit 2.
7. The grievor, Jane Gaw, and all other grievors in her position prior to certification, were paid in the manner specified in paragraph 6 where the position was expected to last more than 30 days which meant she received approximately \$141.00 per day and all benefits that applied to members covered by the collective agreement (Exhibit 2).
8. Following the certification of the Complainant Union, the grievors and others whom, it was anticipated, would be hired for more than thirty (30) days did not sign Exhibit 3 and 4 but rather signed Exhibit 5 and did not receive the same form of payment as referred to in paragraph 6, but rather were paid as follows:

For the first 20 days, a daily rate of \$123.00.

From the 21st day following, a daily rate based upon qualifications and recognized experience and the salary paid for contract teachers.

No benefits were paid or received.

9. Prior to certification, when "replacement" teachers were hired for an assignment expected to last less than 30 days, they were paid in accordance with the rate set out in paragraph 8 herein and signed Exhibit 5 (as amended by their individual circumstances.)
10. Prior to certification, the grievors filled positions expected to last more than 30 days as advertised in Exhibit 6. After certification, the grievors filled positions expected to last more than 30 days as advertised in the form of Exhibit 7.
11. Had the provisions of Article 13 of Exhibit 2 been operative at the time of the hiring of the grievors after certification as "replacement" teachers for more than 30 days, they would have signed Exhibit 3 and 4 and would have received the salary and benefits provided in Article 13.10(a) of Exhibit 2.

3. The Board next sets out the submission of counsel in highly abbreviated form.

4. Counsel for the applicant reviewed the statutory freeze provision and the jurisprudence, asserting that the purpose of the section was to provide a period of stability while the parties were establishing their collective bargaining relationship or renewing their collective agreement. In counsel's view, the Board need not conclusively determine whether the persons in question were "occasional", "contract" or "hybrid" teachers as, whatever their formal status, the recognized pat-

tern of their employment relationship prior to certification had changed and was now inferior to the wages and benefits enjoyed previously. However, counsel further argued that the grievors were persons described in Article 13.10(a) of the collective agreement between the responding party and the applicant union (and the Federation of Women Teachers' Association of Ontario) (hereinafter referred to as the "collective agreement"). It was contended that the grievors were occasional teachers within the meaning of the *Education Act* and the fact that the responding party required those teachers to sign a probationary teacher's contract in addition to a letter of employment did not serve to change the grievors' status from occasional to probationary. Counsel submitted that the effect of Note 3 in the collective agreement was to extinguish the collective agreement provisions relating to occasional teachers if occasional teachers acquired collective bargaining rights under the *Labour Relations Act* since the bargaining agent of those occasional teachers would then have the right to bargain on their behalf. Counsel urged the Board to find the statutory freeze provision had been violated, to so declare and to compensate those suffering losses occasioned by the breach. Counsel asked that the Board remain seized in the usual course and issue a direction that the wages and benefits be maintained until the conclusion of a collective agreement or until the parties were in a legal strike/lockout position. Cases referred to in support: *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859; *Simpsons Limited*, [1985] OLRB Rep. Apr. 594; *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49.

5. Counsel for the responding party submitted that the bargaining unit for which the applicant union was certified excluded probationary and regular teachers. Further, it was asserted that, because a probationary teacher's contract was signed by the persons in question, they could not be occasional teachers and, hence, were not employees in the bargaining unit at the time of the freeze, although they had become bargaining unit members subsequently. That is, counsel contended that Article 13.10(a) of the collective agreement referred to probationary contract teachers notwithstanding that article was headed "occasional teachers". These probationary teachers had simply agreed at the point of hiring to the termination of their contract on a specific date or on the return of the teachers they replaced. Counsel stated that the responding party had paid, subsequent to the freeze, all occasional teachers (regardless of whether they worked more than or fewer than 30 days) on the basis those persons in Article 13.10(b) had been paid prior to the freeze. Since, in counsel's view, the Article 13.10(a) teachers were not occasional teachers, their wages and benefits were not caught by the freeze. In effect, there were no Article 13.10(a) "occasional" teachers prior to the freeze whose wages and benefits were frozen. Thus, the responding party, it was argued, had not altered anything; all occasional teachers were paid according to the rates in Article 13.10(b) prior to and subsequent to the imposition of the freeze. In the alternative, counsel submitted that, if there was a change, that did not constitute a statutory violation as the union must be taken to have granted consent to such change by negotiating Note 3 in the collective agreement which extinguished Article 13 in its entirety as of the date collective bargaining rights were obtained for occasional teachers. Further, counsel noted that replacement teachers who had worked more than 30 days must be regarded as cognizant of their status as contract teachers and of Note 3, their reasonable expectations would be that Article 13.10(b) rates would be applicable once the occasional teachers were certified. Cases cited included: *Spar Aerospace Products*, *supra*; *Simpsons Limited*, *supra*.

6. In reply, applicant counsel rejected the interpretation of Article 13.10(a) asserted by counsel for the responding party as inconsistent with the structure of the article and its substantive content, including the three notes therein. Counsel argued that the provisions and purpose of the probationary teacher's contract was inconsistent with the terms of the employment letter signed by the replacement teachers and the mere signing of the probationary teachers contract at the responding party's behest did not make those persons probationary teachers as contemplated by the *Education Act*. Finally, counsel noted that the effect of Note 3 in Article 13 was not prior con-

sent by the applicant union to a change in wages and benefits but merely to extinguish Article 13. What remained - and what was caught by the freeze - were the wages and benefits paid prior to certification.

7. In the Board's view, the grievors were (and are) occasional teachers. That conclusion is consistent with the definition of occasional teachers in section 1(1) of the *Education Act* as:

"... a teacher employed to teach as a substitute for a permanent, probationary, continuing education or temporary teacher who has died during the school year or who is absent from his or her regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year..."

The grievors, prior to certification, were employed in excess of 30 consecutive teaching days to replace another teacher on contract. The grievors signed letters of employment which specified the quantum of the assignment (e.g. 0.9, 0.8) and the "terminal basis" of their employment to the earlier of the end of the school year or the date on which the (named) teacher being replaced returned to work. Further, the existence of this category of occasional teachers is expressly contemplated by Article 13.10(a) of the collective agreement.

8. The interpretation of the collective agreement urged by counsel for the responding party is not compelling. Article 13.10 on its face deals with occasional teachers of three types, as noted in subsections (a), (b) and (c). It would do violence to the contractual language and the structure of the article to interpret 13.10(a) teachers as not "occasional" within the meaning of the *Educational Act* but "statutory form teacher" (specifically, probationary teachers). For example, Article 13.10(a) refers to "open-ended terminal contracts" and that term is defined in Note 1 of Article 13.10 as a "contract to extend to the end of the school year or until the teacher being replaced returns to duty, if such return is before the end of the school year". The *Educational Act* does not speak of open-ended terminal contracts but, rather, prescribes precisely, in the regulations, the form of contract to be entered into by probationary and permanent contract teachers. In the Board's view, Article 13.10 is a provision negotiated between the bargaining agent for statutory form teachers and the school board which sets out terms and conditions of employment of occasional teachers who are not members of that bargaining unit. The article expressly contemplates the possibility of certification of occasional teachers under the *Labour Relations Act* (in contrast to statutory form teachers whose labour relations are governed by the *School Boards and Teachers Collective Negotiations Act*). In such event, as stated in Article 13.10 Note 3, the article shall be deemed null and void as of the date on which such collective bargaining rights are acquired. In short, the parties to the collective agreement have negotiated a comprehensive provision in that agreement concerning occasional teachers unless and until that group is certified under the *Labour Relations Act*.

9. The Board is not persuaded by the submissions of counsel for the responding party that the fact that the grievors also signed a document entitled Probationary Teacher's Contract resulted in the grievors becoming statutory form teachers. Article 13.10(a) contemplates and requires that occasional teachers sign open-ended terminal contracts, *not* statutory form contracts. Further, the provisions in the probationary teacher's contract, taken together, are not descriptive of or consistent with the terms of employment of the grievors at the relevant time as described in Article 13.10(a) and as reflected in the letters of employment signed by the principal of the school and the teacher. The probationary teacher's contract is intended to provide a school board with the opportunity to evaluate a teacher's performance, to assess whether the school board wishes to offer the teacher a "regular" teaching post. The letter of employment and Article 13.10(a) (and Note 1) refer to a period of less than one year, commencing with the absence of the teacher being replaced and terminating at the earlier of the date that teacher returns or the end of the school year. The

Article is directed to the replacement of a regular or probationary teacher on leave of some sort and only for the duration of the leave or until the end of the school year. A longer term relationship is not envisaged for this category of teachers. The interpretation asserted by counsel for the responding party that the earlier of the end of the school year or the date on which the teacher being replaced returned to work "constitutes the prior agreement by the teacher and the school board to terminate the agreement "at any time by mutual agreement in writing" of the teacher and the school board is not persuasive. In this regard, it should also be noted that the probationary teacher's contract requires the signatures of the chairman of the school board and the secretary of the school board, under the seal of the school board and the teacher whereas the letter of employment is merely signed by the principal of the school and the teacher. That is, counsel's proposition would have the signature of a principal of a school alone constitute the consent of the school board to terminate a contract where the original document was subject to much greater formality and with no suggestion in the original document that such a vehicle for consent was contemplated by the parties. That is not a tenable proposition.

10. The fact that union dues have been deducted by the school board likewise cannot serve to transform the grievors into statutory form teachers. Article 13.10(a) does not require the deduction of such dues and, indeed, only establishes the entitlement of the teacher to all benefits applying to members covered by the collective agreement and placement on the salary grid having regard to the teacher's qualifications and experience.

11. The above analysis grounds the Board's conclusion that the grievors were occasional teachers falling under Article 13.10(a) of the collective agreement and whose wage rates and benefits were established in accordance with that article. As of July 2, 1992 the applicant trade union was certified as bargaining agent for all occasional teachers employed by the Leeds and Grenville County Board of Education in its elementary schools in the Leeds and Grenville County. The grievors, for the reasons given, do not fall within the exclusion from the bargaining unit of statutory form teachers. As noted, Article 13.10 was deemed null and void by the effect of Note 3 in that article upon the acquisition of bargaining rights by the occasional teachers. Note 3, however, could not serve to extinguish the statutory freeze, nor was such a consequence asserted.

12. The Board's approach in assessing whether the freeze provision has been violated was articulated in *Simpsons Limited, supra*, and *Spar Aerospace Products, supra*. That jurisprudence was not disputed and need not be reiterated herein. Further, in the instant case, the parties have acknowledged in their agreed facts, as set out therein, that the grievors were not paid the same wages and benefits subsequent to the certification of the applicant union. The Board has rejected counsel for the responding party's argument that the grievors were statutory form (in this case, probationary) teachers and not occasional teachers within the bargaining unit applied for and, thus, whose terms and conditions of employment, rights, privileges or duties were not caught by the statutory freeze. Consequently, those terms and conditions of employment, rights, privileges and duties were frozen and the responding party's alteration of those matters constitutes a contravention of the Act. Given the Board's analysis of Article 13.10 and the Board's conclusion that the teachers in question were occasional teachers, the Board need not deal with the other argument of counsel for the applicant that, regardless of their formal status, the terms of employment of the teachers in question were caught by the freeze. Further, the Board does not regard as compelling the assertion that Note 3 in Article 13.10 constitutes the prior consent of the applicant union to the changes by the responding party to the terms and conditions of employment of the grievors. The Board is satisfied that Note 3 was solely intended to provide for an orderly transition of the employment relationship of occasional teachers from that provided for in the collective agreement to that contemplated under the *Labour Relations Act* when and if occasional teachers were certified pursuant to that Act. The Board notes that a similar result would be effected by operation of

law, apart from the collective agreement terms, if and when occasional teachers were certified pursuant to the *Labour Relations Act*.

13. For the foregoing reasons, the Board declares that section 81 of the Act has been violated. The Board directs the responding party to fully compensate those bargaining unit members for any and all losses they suffered as a result of that violation and to reinstate the terms and conditions of employment, rights, privileges and duties existing at the point the statutory freeze was imposed by operation of the Act. Those terms and conditions of employment, rights, privileges and duties are to be continued for the duration of the freeze unless altered with the consent of the applicant trade union. The quantification of those losses is remitted to the parties. However, the Board remains seized to deal with that issue should the parties be unable to agree or in the event there is any other difficulty arising out of the interpretation or implementation of this decision.

2927-92-R Office and Professional Employees International Union, Applicant v. Ombudsman Ontario, Responding Party

Bargaining Unit - Certification - Bargaining unit agreed upon by parties including 6 lawyers employed in their professional capacity - Union submitting written declarations demonstrating that majority of professionals affected wishing to be included in bargaining unit with other employees - Board finding it appropriate under subsection 6(4.1) of the Act to so include them - Certificate issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

DECISION OF THE BOARD; February 5, 1993

1. This is an application for certification in which the parties have reached agreement on all matters relevant to the disposition of the application, and have further agreed to waive a formal hearing in the matter.

2. The applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Having regard to the material before the Board, and agreement of the parties in that respect, the Board finds that:

all employees of Ombudsman Ontario in the Province of Ontario, save and except Managers or Assistant Directors, persons above the rank of Manager or Assistant Director, Administrative Assistants, Administrative Secretaries to Directors, Legislative Liaison, students involved in co-operative training programs with a high school, college or university and students employed during the school vacation period,

constitute a unit of employees of the responding party appropriate for collective bargaining.

4. In accordance with the Board's Rules of Procedure respecting applications for certification, the responding employer has filed a list of employees in the bargaining unit, together with specimen signatures for the employees on that list. Having regard to the list filed by the employer,

and the finding of the Board with respect to the bargaining unit description as aforesaid, the Board is satisfied that there were ninety-two employees in the unit at the time the application was made.

5. We note that six of these ninety-two employees have been identified by the parties as being “lawyers”. In fact, it appears that three are students et al who are performing their articles for the Ombudsman Ontario. While there is a “student member” class of “membership” in the Law Society of Upper Canada, it appears that the definition of “member” in section 1 of the *Law Society Act* excludes students at law. It would therefore appear that student members are not members. Quite apart from that, it seems clear that students-at-law are precisely that and not lawyers.

6. Subsections 6(4), 6(4.1) and 6(4.2) provide that:

6(4) Subsections (4.1) and (4.2) apply with respect to employees who are entitled to practise one of the following professions in Ontario and who are employed in their professional capacity:

1. Architecture.
2. Dentistry.
3. Engineering.
4. Land Surveying.
5. Law.

(4.1) A bargaining unit consisting solely of employees who are members of the same profession shall be deemed by the Board to be a unit of employees appropriate for collective bargaining.

(4.2) Despite subsection (4.1), the Board may include the employees described in subsection (4.1) in a bargaining unit with other employees if the Board is satisfied that a majority of the employees described in subsection (4.1) wish to be included in the bargaining unit.

Students-at-law are not entitled to practice the profession of law and it seems to us that these subsections therefore do not apply to them. However, we need not actually determine that issue in this case. Whether or not the students-at-law in this case are considered to be members of the profession of law for purposes of the *Labour Relations Act*, the majority of the persons affected in this case have demonstrated that they wish to be included in the bargaining unit herein by means which include a written declaration to that effect.

7. In the result, the Board is satisfied that a majority of the employees to whom subsection 6(4) applies herein wish to be included in the bargaining unit herein, and the Board finds it appropriate to so include them.

8. In support of this application for certification, the applicant union has filed documentary evidence of membership on behalf of sixty-two persons. This membership evidence is supported by a duly completed Form A-4 Declaration verifying membership evidence.

9. The Board is satisfied, on the basis of the evidence before it, that more than fifty-five percent of the employees of the responding party in the bargaining unit, at the time the application was made, were members of the applicant on January 12, 1993, which is both the application date and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 8(1) of the Act.

10. A certificate will issue to the applicant.

2433-92-R Practical Nurses Federation of Ontario, Applicant v. Strathroy Middlesex General Hospital, Responding Party

Bargaining Unit - Certification - Practical Nurses Federation of Ontario seeking to represent bargaining unit composed of all hospital employees employed in nursing capacity as registered and graduate nursing assistants -Board dismissing prior certification application having found proposed unit of all employees employed as registered and graduate nursing assistants inappropriate - Hospital objecting to proceeding on the basis of *res judicata* - Board viewing application as, in essence, request for re-litigation of issues finally determined by the Board between the parties - Application dismissed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Ronson* and *G. McMenemy*.

APPEARANCES: *Douglas J. Wray*, *Otalene Shaw* and *Yvette MacGregor* for the applicant; *Allan Shakes* and *Glenda Houlston* for the responding party.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER J. A. RONSON: February 15, 1993

1. This is an application for certification in which the Practical Nurses Federation of Ontario ("PNFO") seeks to represent the following unit of employees of Strathroy Middlesex General Hospital ("the Hospital"):

all employees of Strathroy Middlesex General Hospital employed in a nursing capacity as Reg'd and Graduate Nursing Assistant[s] save and except supervisors, and person above the rank of supervisors.

2. At the hearing into this application, the Hospital raised an objection to proceeding with this matter, on the basis of *res judicata*. It is the Hospital's position that the PNFO is barred from making the application by a decision of the Board dated October 30, 1992, which dismissed a prior certification application concerning these same parties. In the Hospital's submission, the bargaining unit sought by the PNFO in the present application is the same as that under consideration in the previous decision of the Board, and which the Board found to be inappropriate.

3. This preliminary objection to the application was raised by the Hospital in a letter to the Board of November 26, 1992, accompanying the Reply. Unfortunately, the PNFO was not sent a copy of this letter and so it appears that it had no notice prior to the hearing of the issue. The Board thus heard full argument at the hearing on December 18, 1992 on all issues concerning the appropriateness of the bargaining unit, reserving the right to both the PNFO and the Hospital to make further written submissions with respect to the issue of *res judicata*. The Board is now in receipt of letters from counsel for PNFO, dated December 31, and counsel for the Hospital, dated January 8, 1993.

4. Ultimately, because of our findings on the preliminary objection, this panel does not need to address the appropriateness of the bargaining unit. Likewise, this panel need not concern itself with the substance of the decision of October 30, nor any of the recent decisions concerning the PNFO and "RNA only" bargaining units, and need not express any views as to the principles which can be derived from them. For the reasons following, we have decided that the present application ought to be dismissed on the basis of issue estoppel.

5. There was no dispute between the parties on the essential facts, which are set out during

the course of this decision. This application was filed on November 13, 1992. On October 30, 1992 a panel of this Board issued a decision in which it dismissed a prior application for certification, finding that the following was an inappropriate bargaining unit:

all employees employed as registered or graduate nursing assistants by the Strathroy Middlesex General Hospital in the Town of Strathroy, save and except head nurse and persons above the rank of head nurse.

6. In his letter of December 31, counsel for the PNFO acknowledges that the Board has applied a principle akin to the common-law doctrine of *res judicata*. However, in his submission, in certain cases where a determination by the Board is based on facts and circumstances that existed at a particular point in time, and there is a material change in the facts over time, the Board's earlier determination will not necessarily be determinative. For instance, the Board may determine that a person is excluded from the Act as exercising managerial duties and responsibilities, yet the Board is not precluded from making a different determination at a later date if there has been a material change in the duties and responsibilities of the person. In the same way, counsel urges that "[i]f the Board's determination of bargaining unit appropriateness is based on the facts, then any decision is obviously determined on the facts as they exist at the time of the Board's determination. If the facts change, the earlier decision cannot be binding. Changes in the facts can occur at any time."

7. The PNFO states that the facts underlying the October 30 decision have changed. Specifically, the facts on which the panel relied to distinguish its findings from the findings of two earlier panels allowing "RNA only" units, have changed, as follows:

1. The RNA who at the time of the earlier application was working as a Porter because she had been laid off as an RNA - Sally Brooks - is now back working as an RNA.
2. The "grandfathered" O.R. technician who was not RNA qualified has now retired. In fact, the Hospital has totally eliminated the classification and job title of "O.R. technician". All the employees currently performing the job are simply classified as "R.N.A.'s".

8. The PNFO urges the Board to find on the "new" facts that the proposed bargaining unit is an appropriate one.

9. In the Hospital's submissions, there are no changes in the material facts and circumstances as they existed or were known to the Board at the time of the prior decision. The previous panel of the Board knew of the "grandfathered" operating room technician, and of the RNA working as a porter due to layoff. In the Hospital's submissions, the question before this panel is exactly the same question that has already been determined by the Board in the October 30 decision, in the context of the same facts.

Decision of the Board

10. We are satisfied that despite the addition of the phrase "in a nursing capacity" to the wording of the bargaining unit proposed by the PNFO in the present application, this unit is the same as that proposed and rejected by the Board in its decision of October 30. In the Board's decision of October 30, it is clearly stated that the unit of employees sought by the PNFO encompassed only those registered or graduate nursing assistants working in a nursing capacity. The unit did not encompass, by way of example, ward clerks in the Hospital who may hold RNA certification. Thus, there is no difference in the group of employees whom the PNFO seeks to represent under

the present application, and those whom it sought to represent in the earlier application. Indeed, the submissions by counsel for the PNFO dated December 31, 1992, do not rely on a different bargaining unit description to address the *res judicata* argument.

11. The Board has in the past endorsed the application by it of a concept akin to *res judicata*. In *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501, the Board stated:

9. Although the Act does not expressly authorize the application of the doctrine of *res judicata*, there are strong practical and policy grounds for doing so. Rights and duties have meaning only if they are certain and relatively stable. Parties expect [sic] that a decision of the Board will clarify their legal relationship and put an end to the controversy between them. Board decisions would lose much of their value if they did not provide a reliable guide for the conduct or planning of the parties' affairs. Continuous litigation would undermine the harmonious relationship between the parties which the Act is designed to foster, and could give rise to abuse and harassment of a weaker party. It could also give rise to costly duplication, inefficient utilization of the Board's scarce resources, and a serious impediment to the effective administration of the Act. This potential consequence is especially serious in labour relations matters where "time is the essence" and finality is an important statutory objective. Moreover, from an institutional point of view, the prospect of relitigation greatly increases the possibility of inconsistent decisions which can only undermine the credibility of the adjudication system and the adjudicators. The doctrine of *res judicata* serves to minimize these possibilities, and is based upon the entirely reasonable expectation that if a judgment is rendered in an earlier case which is related logically to a subsequent proceeding, the former will be taken into account in resolving the latter. Indeed, this is the theory which underpins the development of the common law and the principle of *stare decisis*. Cases involving similar factual and legal questions should be decided in the same way, and if there is a close relationship in terms of the parties and issues involved, the interrelationship of the two proceedings may legitimately preclude the relitigation of those issues already settled. The utility of such doctrine is "obvious" as the Board noted in *Arnold's Markets*, 62 CLLC ¶16,221 at page 992:

"It seems obvious that as a general rule, once a fact or question has been put in issue and directly adjudicated upon in a proceeding before the Board, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or estoppel with the result that it must accept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and involving the same questions or facts decided by it in the first decision.

12. Just as the Board is not expressly *authorized* by the Act to apply the doctrine of *res judicata*, or analogous principles, neither is it *compelled* to apply it. However, as was stated in the above case, there are strong practical and policy grounds for doing so. More recently, in *Ellis-Don Limited*, [1992] OLRB Rep. Sept. 999, the Board once again reviewed the policy rationale for the application of *res judicata* or a like principle by the Board, stating:

11. *Res judicata* is a form of estoppel. Developed by the courts, the doctrine in its modern form is based on two broad principles of public policy:

- a) that all litigation should have an end; and,
- b) that no party should be forced to litigate the same matter more than once.

The doctrine of *res judicata* operates to preclude a party or its privies from re-litigating issues (other than through an appellate process) which have been resolved by a final judgement on the merits by a court or tribunal of competent jurisdiction. In effect, such a decision creates two forms of estoppel: cause of action estoppel and issue estoppel. The essence of such an estoppel, regardless of its form, is that a specific final determination by a court or tribunal of competent

jurisdiction of a right, question or fact is conclusive evidence thereof in any subsequent proceeding between the same parties or their privies (or, if the judgement is *in rem*, in any subsequent proceeding) so long as the judgement stands, unless a party otherwise bound by such a previous determination can establish that there is a fact which, if proved, would entirely change the situation and could not, by the exercise of reasonable diligence, have been previously ascertained (*Angle v. Minister of National Revenue*, [1975] SCR 248, 47 DLR (3d) 544; *Town of Grandview v. Doering*, [1975] 61 DLR (3d) 455 (Supreme Court of Canada)).

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13. While not bound to apply the doctrine of *res judicata*, the Board has applied it (or a principle analogous to it) in order to ensure that, subject to its power to reconsider, its decisions are final and conclusive of the disputes or issues which the Board determines (see, among others, *Canadian General Electric Company Ltd.*, [1978] OLRB Rep. Apr. 384 and cases cited therein; *Napev Construction Limited*, [1980] OLRB Rep. June 862; *K-Mart Canada Limited*, [1981] OLRB Rep. Feb. 185; *Construction Association of Thunder Bay Inc.*, [1987] OLRB Rep. July 976). The Board's application of *res judicata* has been approved of by the courts (*Radio Shack*, [1979] OLRB Rep. Mar. 248, upheld at 79 CLLC ¶14216 (Ont. Div. Court) and see also 80 CLLC ¶14017 (Ont. Div. Court); *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501, application for judicial review dismissed, November 3, 1981, Ont. Div. Court, unreported).

13. We agree with counsel for the PNFO that the Board does not, in its search for finality, necessarily preclude a party from asking for a determination of employee status where it can establish that the facts have materially changed. In *Oakwood Park Lodge*, the Board discussed several cases where the Board permitted fresh applications with respect to employee status to proceed, notwithstanding previous agreements between the parties or decisions by the Board. Likewise, it is possible that where a determination of the appropriateness of a bargaining unit is based on a set of facts which are fixed at a particular point in time, a materially changed set of facts might lead the Board to consider a fresh application for the same bargaining unit.

14. It is important to note that the Board has the power, by statute, to reconsider its decisions. The Board has developed principles which it applies in considering requests for reconsideration. In *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185, the Board stated:

To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the cases. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC ¶14,132, (Ont. Div. Ct.).

15. The notion that the Board will not normally consider new evidence unless it was not previously available by the exercise of due diligence, is also reflected in the discussion of *res judicata* in *Ellis-Don Limited*. Although this is not a request for reconsideration, the timing of the application, and the limited grounds advanced by the PNFO for considering this as a fresh application, seem to raise the same kinds of issues which arise in a request for reconsideration. Certainly, we see no reason to apply any more *liberal* grounds to this applicant in determining whether it is precluded from making this application, than we would had it made a request for reconsideration.

16. With these thoughts in mind, we have some difficulty in viewing the two facts on which the PNFO relies as distinguishing the present application from the earlier one, as “new”. Reading the Board’s decision of October 30, it is apparent that the Board was aware that the then current status of the RNA qualified porter and the O.R. technician was a temporary situation. The facts before the Board established that the only O.R. technician without RNA qualification was expected to retire shortly. The facts also established that the RNA qualified employee who was working as a porter had chosen to take the position of relief porter in order to avoid lay off. Again, it was foreseeable that this employee might be returned to her RNA job. Thus, the findings of the Board with respect to the appropriateness of the bargaining unit proposed by the PNFO were made against a set of facts which included the knowledge of and anticipation of the facts placed before this panel. In this respect, it would be destructive of the parties’ and of the general community’s interests in finality and certainty of Board decision-making, to permit the re-litigation of the issues which the Board has already determined in its October 30 decision.

17. Further, even if the facts which are placed before us could be viewed as “new” facts which are a change from those before the Board at the time of its October 30 decision, we do not see them as so changing the landscape of the circumstances under consideration by the previous panel, as to support a fresh application.

18. For these reasons, this application is dismissed on the basis that it is in essence a request for the re-litigation of issues which have been finally determined by the Board between these parties.

DECISION OF BOARD MEMBER G. MCMENEMY: February 15, 1993

1. I dissent.

2. The majority decision has dismissed this application for certification on the basis of issue estoppel, and I disagree with their reasoning for the dismissal.

3. In the decision, counsel for the Practical Nurses Federation of Ontario (“PNFO”) acknowledges that the Board has applied a principal akin to the common-law doctrine of *res judicata*, and goes on to point out how different facts and circumstances can alter an earlier decision of the Board. (Paragraph 6)

4. In dealing with how the facts have changed, I will begin with the O.R. technician. The O.R. technician in the earlier case was a separate classification, and the person in the job was not R.N.A. qualified, and going to retire soon. When the person retired, if the classification had been filled by a person who was not R.N.A. qualified, then I would agree that the facts had not changed. But that is not the case. The classification, and the job title has been totally eliminated, and anyone now performing that job is now simply an “R.N.A.”.

5. In regards to the porter position, again there is a change of facts. In the earlier decision, the bargaining unit applied for included an R.N.A. qualified person who was working as a porter, which was agreed to by both parties. In the application before us, this fact is no longer present, since this person is no longer working as a porter.

6. In the earlier decision, the majority found these two facts “particularly troublesome”, and which they used to distinguish their case from *Mississauga Hospital*, [1991] OLRB Rep. Dec. 1380, and *South Muskoka Memorial Hospital*, [1992] OLRB Rep. Apr. 520. The majority in doing so, decided contrary to a line of cases that had established the appropriateness of an RNA-only bargaining unit. With the earlier *Strathroy* case, using this narrow fact difference, it is not fair or

reasonable for the majority in this decision to broaden the factual context than was actually considered in the earlier decision.

7. The current application before this panel, involving the same parties in the earlier decision, is not a request for reconsideration, or an attempt to re-litigate an issue already decided. It is an application based on a different factual context than the earlier *Strathroy* decision; a material change of facts that goes to the heart of the earlier decision and which drastically changes the circumstances considered by the majority in this decision.

8. I would not dismiss this application, but let the certification process determine the natural course of this application by the PNFO.

COURT PROCEEDINGS

2208-90-R (Court File No. 653/92) Alpa Wood Mouldings Company, a division of Alpa Lumber Inc., Applicant v. The Ontario Labour Relations Board and Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Respondents

Certification - Dependent Contractor - Construction Industry - Judicial Review - Whether certain individuals or entities properly characterized as “employees” or “dependent contractors”, or as “independent contractors” - Board finding certain entities not dependent on respondent employer and therefore “independent contractors” - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing - Divisional Court dismissing employer’s application for judicial review

Board decision reported at [1992] OLRB Rep. Aug. 891.

Ontario Court of Justice, Divisional Court, McMurtry A.C.J.O.C., Van Camp and Steele JJ., February 10, 1993.

McMurtry A.C.J.O.C. (endorsement): The applicant is applying to set aside and quash a decision of the Respondent, OLRB, on the basis that it was a patently unreasonable decision. It is, of course, not necessary that this Court agree with the decision of the Board. We are of the view that while some of the findings of the Board are not supported by the evidence that there was evidence before it which was capable of supporting the Board’s findings of fact that MR was a “dependent contractor” of the applicant. The application is therefore dismissed with costs payable to the respondent Carpenters and Allied Workers et al fixed in the amount of \$2,500.00

0429-91-U (Court File No. 692/92) Sobeys Inc., Applicant v. United Food and Commercial Workers' International Union, Local 1000A, Respondent

Discharge - Intimidation and Coercion - Judicial Review - Unfair Labour Practice - Stay - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Motions judge staying Board's decision - Order of motions judge set aside by 3-judge panel of Divisional Court on basis that judge applied the wrong test on a stay and on basis of certain factual errors in her decision - Divisional Court holding that strong *prima facie* case that decision patently unreasonable must be made out before a stay should be granted

Board decision reported at [1992] OLRB Rep. Sept. 1020. Divisional Court decision reported at [1992] OLRB Rep. Dec. 1237.

Ontario Court of Justice, Divisional Court, McMurtry A.C.J.O.C., Van Camp and Steele JJ., February 25, 1993.

STEELE J.: (ORALLY) This is a motion under s.21(5) of the *Courts of Justice Act*, R.S.O. 1990, c.43 to set aside the order of Greer J., dated December 22, 1992 staying the implementation of the decision of the Ontario Labour Relations Board ("the Board") dated September 16, 1992, pending the hearing of an application for judicial review.

We do not agree with the submission that this Court should deal with the matter as if it were an appeal such as an appeal to a single judge of the General Division from a Master and apply the test set out in *Marleen Investments Ltd. v. McBride et al.* (1979), 23 O.R.(2d) 125. This panel of the Court may set aside or vary the decision of a single judge of this Court who heard a motion. No reference is made to it being an appeal. As stated by Morden A.C.J.O. in *Overseas Missionary Fellowship v. 578369 Ontario Ltd.* (1990), 73 O.R. (2d) 73 (C.A.) at p. 75:

... In the context of s.16(3)(b) we think that by the use of "set aside or vary" it was intended to give the panel all of the powers of a single judge with respect to the proper disposition of the motion.

Section 16(3)(b) referred to therein is now replaced by s.21(5).

Many motions are brought on short notice without full material. In the interest of justice the panel of the court should look at all the merits of the motion without being restricted to what was placed before the judge of first instance.

In our opinion Greer J. applied the wrong test in granting the stay. We are of the opinion that the cases referred to in her reasons do not detract from the basic principle that a panel of the court hearing an application for judicial review should not interfere with the decision of the Board unless the decision is patently unreasonable. We do not agree that the decision in *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644 altered the basic test of patently unreasonable on matters subject to judicial review. It was argued that cases dealing with stays of labour relations boards proceedings stem from the decision in *Re Attorney General of Manitoba and Metropolitan Stores*

(*M.T.S.) Limited et al.*, (1987), 38 D.L.R. (4th) 321 and that the test is not a strong *prima facie* case but the more traditional test in commercial and constitutional cases. It should be noted that the Manitoba case was a constitutional case. We agree that that is the test applicable before a labour relations board makes a decision but that it is not applicable to the stay of a decision once made.

The Board's decision is protected by the strong privative clause contained in s.110 of the *Labour Relations Act*, R.S.O. 1990, c.L.2. On judicial review the court should not interfere with the Board's decision unless it is patently unreasonable. This is a high standard and on a motion for a stay, a strong *prima facie* case must be made out that that high threshold can be met before a stay should be granted. The emphasis must be on the word "strong" and it must go beyond simply what may be an arguable case. We agree with the decision in *Ellis-Don Limited v. The Ontario Labour Relations Board*, 10 O.R. (3d) 729.

It would appear that Greer J. did not apply the strong *prima facie* case test. We are also satisfied that there are certain factual errors in her decision. The court hearing a motion must accept the facts as found by the majority of the Board (see s.104(1) of the *Labour Relations Act*) and consider only whether or not the decision based on those facts was patently unreasonable.

On hearing a motion for a stay the court is not called upon to decide the actual judicial review but only to decide whether or not there is a strong *prima facie* case. Because we do not want to influence the court hearing the judicial review application we wish only to say that we have reviewed the Board's decision and the other material before us and are of the opinion that the applicant Sobeys has failed to meet the test of a strong *prima facie* case. For these reasons the stay order is set aside.

We fix the costs before Greer J. in the sum of \$2,500 and before us in the sum of \$2,500 with the end result that the respondents will be entitled to total costs fixed in the amount of \$5,000.

CASE LISTINGS JANUARY 1993

	PAGE
1. Applications for Certification	21
2. Applications for Combination of Bargaining Units.....	29
3. Applications for Declaration of Related Employer.....	29
4. Sale of a Business	30
5. Crown Transfer Act	31
6. Applications for Declaration Terminating Bargaining Rights.....	31
7. Complaints of Unfair Labour Practice	32
8. Applications for Interim Order	36
9. Applications for Consent to Prosecute.....	36
10. Applications for Religious Exemption.....	36
11. Applications for Consent to Early Termination of Collective Agreement	37
12. Jurisdictional Disputes.....	37
13. Applications for Determination of Employee Status.....	37
14. Complaints under the Occupational Health and Safety Act	38
15. Construction Industry Grievances	38
16. Applications for Reconsideration of Board's Decision	42

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1993

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0062-90-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Canadian Newspapers Company Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Canadian Newspapers Company Limited in its Cambridge Reporter Division in the City of Cambridge, save and except publisher, advertising manager, managing editor, city editor, circulation manager, accountant, lifestyles editor, classified supervisor, confidential clerk, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, students employed in a co-operative training programme and employees in bargaining units for which any trade union held bargaining rights as of April 5th, 1990" (24 employees in unit)

0254-91-R: United Food and Commercial Workers International Union ("UFCW") (Applicant) v. Nutritional Management Services Limited ("Nutritional") (Respondent) v. Ontario Public Service Employees Union ("OPSEU") (Intervener)

Unit: "all employees of Nutritional Management Services Limited employed at the Guelph Correctional Centre, save and except managers and persons above the rank of manager" (15 employees in unit) (*Clarity Note*)

0975-91-R: Southern Ontario Newspaper Guild, Local 87 the Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. NOW Communications Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of NOW Communications Inc. in Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except for editor/publisher, executive editor, associate publisher, production co-ordinator, operations manager, executive assistant, credit manager, classifieds manager, circulation director, classifieds director, and office manager." (43 employees in unit)

1575-91-R: Labourers' International Union of North America, Local 607 (Applicant) v. Grant Development Corporation and/or The Ojibways of Pic River, First Nation (The Pic 50 - Heron Bay Indian Band) (Respondents)

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing or restoration work in the employ of Grant Development Corporation in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit) (*Having regard to the agreement of the parties*)

0906-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Filsinger Lumber Ltd. c.o.b. as Beaver Lumber (Respondent)

Unit: "all employees of Filsinger Lumber Ltd. c.o.b. as Beaver Lumber in its store in the City of Guelph, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, outside sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (36 employees in unit) (*Having regard to the agreement of the parties*)

1639-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Crossroads Homes Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of Crossroads Homes Inc. in all sectors of the construction industry in Board Area 18 excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons.” (3 employees in unit)

1787-92-R: Local 164, Draftmen’s Association of Ontario International Federation of Professional and Technical Engineers, A.F.L., C.I.O., C.L.C. (Applicant) v. Asea Brown Boveri Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

Unit #2: “all employees of Asea Brown Boveri Inc. located at 201 Woodlawn Road West, Guelph, who are classified as design engineers, research and development engineers, manufacturing engineers and design specialists, save and except managers, persons above the rank of manager, members of the engineering profession entitled to practice in Ontario and employed in a professional capacity, students employed in a co-operative educational program or during the school vacation period, persons regularly employed for not more than 24 hours per week, and persons employed in the engineering development program” (10 employees in unit)

2305-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 & Local 93 (Applicants) v. 755676 Ontario Inc. carrying on business as Capital Millwork & Renovations (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of 755676 Ontario Inc. carrying on business as Capital Millwork & Renovations in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of 755676 Ontario Inc. carrying on business as Capital Millwork & Renovations in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (19 employees in unit)

2414-92-R: Bakery, Confectionery & Tobacco Workers’ International Union Local 264 (Applicant) v. Dimpflmeier Bakery Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all driver salesmen and transport drivers of Dimpflmeier Bakery Limited working at or out of the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (33 employees in unit)

2562-92-R: United Food and Commercial Workers International Union AFL/CIO; C.L.C. (Applicant) v. Lockwood Foods Inc. (Respondent)

Unit: “all employees of Lockwood Foods Inc. operating as LOEB Club Plus Preston, 927 King Street East, Cambridge, save and except Store Managers, persons above the rank of Store Manager, Promotions Manager, Head Cashier, Assistant Head Cashier and Bookkeeper” (131 employees in unit) (*Having regard to the agreement of the parties*)

2575-92-R: Teamsters Local Union No. 419 (Applicant) v. Q.F. Food Distribution Services Ltd. (Respondent)

Unit: “all employees of Q.F. Food Distribution Services Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff” (9 employees in unit) (*Having regard to the agreement of the parties*)

2651-92-R: Retail, Wholesale and Department Store Union (Applicant) v. Three Top Investments Holding Inc. c.o.b. as Windsor Park Hotel (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Three Top Investments Holding Inc. c.o.b. as Windsor Park Hotel in the City of Sault Ste. Marie, save and except general operations manager, dining room supervisor, chef, persons above the rank of supervisor and office staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

2682-92-R: International Union of Operating Engineers, Local 796 (Applicant) v. The Ottawa Young Men’s and Young Women’s Christian Association (Respondent)

Unit: “all employees of The Ottawa Young Men’s and Young Women’s Christian Association at 180 Argyle Street and 200 Lockhart Street in the City of Ottawa, save and except professional staff, office staff, department managers, assistant department managers, physical instructors, graduate dietitians, student dietitians, supervisors, foremen, persons above the rank of supervisor and foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period” (16 employees in unit) (*Having regard to the agreement of the parties*)

2688-92-R: United Steelworkers of America (Applicant) v. Richards-Wilcox Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Richards-Wilcox Canada Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and office, clerical and sales staff” (47 employees in unit) (*Having regard to the agreement of the parties*)

2708-92-R: Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Imperial Optical Company Ltd., and United Headwear, Optical and Allied Workers Union of Canada Local 4 (Respondents)

Unit: “all employees of Imperial Optical Company Ltd. in the Cities of St. Catharines, Welland, Ottawa and Owen Sound, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and licensed ophthalmic dispensers and those employed in that capacity” (17 employees in unit) (*Having regard to the agreement of the parties*)

2756-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Corporate Foods Limited (Respondent)

Unit: “all employees of Corporate Foods Limited c.o.b. as Dempsters Bread in the City of Markham, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

2768-92-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. M.M.A. Contracting Limited (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of M.M.A. Contracting Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of M.M.A. Contracting Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2779-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 843547 Ontario Limited (Respondent)

Unit: “all employees of 843547 Ontario Limited c.o.b. as Comfort Inn in Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff” (22 employees in unit) (*Having regard to the agreement of the parties*)

2788-92-R: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Applicant) v. 713537 Ontario Inc., c.o.b. as H.T. Lawrence Excavating and 756298 Ontario Ltd., c.o.b. Lawrence Construction (Respondents)

Unit: “all construction labourers in the employ of 713537 Ontario Inc., c.o.b. as H. T. Lawrence Excavating

and 756298 Ontario Ltd., c.o.b. Lawrence Construction in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2798-92-R: Hotels, Clubs, Restaurants, Taverns Union - Local 261 (Applicant) v. P.C.W. Hospitality Inc. c.o.b. as Hotel Roxborough (Respondent)

Unit: "all employees of P.C.W. Hospitality Inc. c.o.b. as Hotel Roxborough in the City of Ottawa, save and except Department Heads, persons above the rank of Department Head, sales and office staff and any persons for whom any trade union held bargaining rights on the date of application, December 22, 1992" (4 employees in unit) (*Having regard to the agreement of the parties*)

2808-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. P & J Controls Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices in the employ of P & J Controls Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices in the employ of P & J Controls Inc., in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2811-92-R: Canadian Security Union (Applicant) v. Hargrave Security International (1986) Inc. (Respondent)

Unit: "all security guards of Hargrave Security International (1986) Inc. employed in Essex County, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week" (38 employees in unit) (*Having regard to the agreement of the parties*)

2848-92-R: United Food & Commercial Workers International Union (Applicant) v. PMH Mechanical (Respondent)

Unit: "all employees of PMH Mechanical in the City of Waterloo, save and except supervisors, persons above the rank of supervisor, office staff and sales staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

2859-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Olympia & York Developments Limited (Respondent)

Unit: "all employees of Olympia & York Developments Limited engaged in cleaning at Aetna Canada Centre, 145 King Street West, Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, clerical and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

2862-92-R: Ontario Nurses' Association (Applicant) v. Reliacare Incorporated c.o.b. as Carleton Place Health Care Centre (Respondent)

Unit: "all registered and graduate nurses employed by Reliacare Incorporated at its Carleton Place Health Care Centre in the Town of Carleton Place, save and except the Director of Nursing and persons above the Director of Nursing" (4 employees in unit) (*Having regard to the agreement of the parties*)

2888-92-R: Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Unions 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309 (Applicant) v. Groupco Inc. Mechanical Contractor (Respondent)

Unit: "all mechanics and mechanics' helpers in the employ of Groupco Inc. Mechanical Contractor in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all mechanics and mechanics' helpers in the employ of Groupco Inc. Mechanical Contractor in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial,

commercial and institutional sector, save and except master mechanic and persons above the rank of master mechanic” (10 employees in unit)

2916-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. Canadian Automobile Association (C.A.A.) Elgin-Norfolk (Respondent)

Unit: “all employees of Canadian Automobile Association (C.A.A.) Elgin-Norfolk in the Town of Simcoe, save and except office manager and persons above the rank of office manager” (5 employees in unit) (*Having regard to the agreement of the parties*)

2918-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Central Chevrolet Oldsmobile (London) Inc. (Respondent)

Unit: “all office and clerical employees of Central Chevrolet Oldsmobile (London) Inc. in the City of London, save and except advisors, secretary treasurers, sales staff, office manager and persons above the rank of office manager” (11 employees in unit) (*Having regard to the agreement of the parties*)

2934-92-R: IWA - Canada (Applicant) v. 774058 Ontario Limited c.o.b. as LOEB-Ajax, Marketplace (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of 774058 Ontario Limited c.o.b. as LOEB-Ajax, Marketplace at 475 Westney Road North in the Town of Ajax, save and except Supervisors, persons above the rank of Supervisor and office employees” (189 employees in unit) (*Having regard to the agreement of the parties*)

2945-92-R: United Food and Commercial Workers International Union, AFL, CIO-CLC (Applicant) v. Banlake Associates Ltd. (Respondent)

Unit: “all employees of Banlake Associates Ltd. c.o.b. as Bancroft I.G.A. in the Village of Bancroft, save and except Store Manager and Assistant Store Manager, persons above the rank of Assistant Store Manager and Accountant” (47 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2949-92-R: Canadian Union of Public Employees (Applicant) v. Bonnechere Manor (Respondent)

Unit: “all office and clerical employees of Bonnechere Manor in the County of Renfrew, save and except Supervisors, persons above the rank of Supervisor, Secretary III's and persons for whom any trade union held bargaining rights as of January 12, 1993” (5 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2289-92-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Bruce County Board of Education (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: “all employees of The Bruce County Board of Education employed as Educational Assistants and Secretarial and Clerical Employees, save and except supervisors, persons above the rank of supervisor, Administrative Assistants to the Director and Superintendents, students employed during the school vacation period, students employed pursuant to a co-operative training program in conjunction with a school, college, or university students attending school on a full-time basis, persons under an employment assistance program, and persons covered by existing collective agreements between The Bruce County Board of Education and the Canadian Union of Public Employees and its Local 1330 and the A.V. Technicians covered under a collective agreement with Local 2712 of the Canadian Union of Public Employees” (124 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	125
Number of persons who cast ballots	109
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	109
Number of ballots marked in favour of applicant	104
Number of ballots marked in favour of intervener	5

2454-92-R: Bayex Employees Association (Applicant) v. Bay Mills Limited, Bayex Division (Respondent) v. United Textile Workers of America, Local 329 (Intervener)

Unit: "all employees employed in St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, technical employees, students employed during off-school hours and during the school vacation period, students engaged in a recognized co-operative training programme and persons regularly employed for not more than 24 hours per week" (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	30
Number of persons listed as in dispute	27
Number of ballots marked in favour of applicant	21
Number of ballots marked in favour of intervener	6

2466-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW Canada) (Applicant) v. Shaw Pipe Protection (Division of Shaw Industries Ltd.) (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener)

Unit: "all employees of Shaw Pipe Protection (Division of Shaw Industries Ltd.) in Welland, save and except foremen, persons above the rank of foreman, sales, office and clerical staff" (54 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	69
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	51
Number of ballots marked in favour of intervener	17

2491-92-R: Employees' Association of Ottawa Carleton (Applicant) v. Carleton Roman Catholic Separate School Board and The Canadian Union of Public Employees and its Local 2152 (Respondents)

Unit: "all school employees of the Carleton Roman Catholic Separate School Board engaged in secretarial, clerk typist and library technician categories, save and except supervisors and persons above the rank of supervisor" (89 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	123
Number of persons who cast ballots	84
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	76
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	54
Number of ballots marked in favour of intervener	21
Number of ballots segregated and not counted	8

2492-92-R: Employees' Association of Ottawa Carleton (Applicant) v. Carleton Roman Catholic Separate School Board and The Canadian Union of Public Employees and its Local 2152-01 (Respondents)

Unit: "all school employees of the Carleton Roman Catholic Separate School Board engaged as Teacher Assistants, Developmental Assistants, Developmental Specialists and Special Assignment Assistants, save and except supervisors and persons above the rank of supervisor" (95 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	143
Number of persons who cast ballots	75
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	72
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	59

Number of ballots marked in favour of intervener	13
Number of ballots segregated and not counted	3

2535-92-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. William Neilson Limited (Respondent) v. International Union of Operating Engineers, Local 796 Intervener)

Unit: “all stationary engineers and their helpers employed by William Neilson Limited in the Town of Halton Hills, save and except chief engineers and persons above the rank of chief engineer” (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1787-92-R: Local 164, Draftmen's Association of Ontario International Federation of Professional and Technical Engineers, A.F.L., C.I.O., C.L.C. (Applicant) v. Asea Brown Boveri Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of Asea Brown Boveri Inc. located at 201 Woodlawn Road West, Guelph, who are members of the engineering profession entitled to practice in Ontario and employed in a professional capacity, save and except managers, persons above the rank of manager, students employed in a co-operative educational program or during the school vacation period, persons regularly employed for not more than 24 hours per week, and persons employed in the engineering development program” (16 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5

Unit #2: (see Bargaining Agents Certified without vote)

Applications for Certification Dismissed Without Vote

0710-89-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 880 (Applicant) v. Ford Motor Company of Canada, Limited (Respondent) v. Group of Employees (Objectors)

1695-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Pre-Eng Contracting Limited (Respondent) (4 employees in unit)

1198-92-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Woodworking Industries (Respondent)

Unit: “all carpenters and carpenters' apprentices employed by Ontario Woodworking Industries in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices employed by Ontario Woodworking Industries in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working Foremen and persons above the rank of non-working Foreman” (4 employees in unit)

2129-92-R: United Steelworkers of America (Applicant) v. Placer Dome Inc., and Group of Employees (Respondent) (272 employees in unit)

2534-92-R: Middle Management Staff Association of the Waterloo Region Roman Catholic Separate School

Board (Applicant) v. Waterloo Region Roman Catholic Separate School Board (Respondent) (25 employees in unit)

2591-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) (Applicant) v. Reg Quinn Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: (see Applications for Certification Dismissed subsequent to a Post-Hearing vote)

Unit #2: “all garage and service centre employees of Reg Quinn Limited at its 6310 Yonge Street location in the Regional Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week save and except supervisors, persons above the rank of supervisor, office and sales staff.” (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2644-92-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. North West Rehabilitation Associates and North York Rehabilitation Associates (Respondent)

Unit #1: “all employees of North West Rehabilitation Associates and North York Rehabilitation Associates in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and physicians” (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	8

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1504-92-R: International Association of Machinists and Aerospace Workers (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of Zellers Inc. employed at its store at 2900 Warden Avenue, save and except supervisors and group merchandisers, persons above the rank of supervisor or group merchandiser, office staff, loss prevention operators, management trainees and students employed on a co-operative training program” (67 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	62
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	51

2591-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) (Applicant) v. Reg Quinn Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: “all garage and service centre employees of Reg Quinn Limited at its 6310 Yonge Street location in the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons regularly employed for not more than 24 hours per week” (34 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	30

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	28

Unit #2: (see Applications for Certification Dismissed without vote)

Applications for Certification Withdrawn

1833-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Kona Builders Limited (Respondent) v. Labourers' International Union of North America, Local 493 (Intervener) v. Group of Employees (Objectors)

2787-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 947465 Ontario Limited c.o.b. as Voyageur Limousine and Van Service/Checker Limousine and Airport Service (Respondents)

2817-92-R: Administrative Support Employees' Association (Applicant) v. Waterloo Region Roman Catholic Separate School Board (Respondent)

2847-92-R: United Food & Commercial Workers International Union (Applicant) v. Linfield Electric (Respondent)

2849-92-R: United Food & Commercial Workers International Union (Applicant) v. Labatts Breweries Limited (Respondent)

2926-92-R: United Steelworkers of America (Applicant) v. Trilea Centres Inc. (Respondent)

2965-92-R: United Steelworkers of America (Applicant) v. Birchmere Retirement Residence, and/or any of Birchmere Residential Hotel, Ontario Company 783720, Birchmere Hotel Limited, Ontario Company 29669, The Birchmere of Orillia Limited, Ontario Company 214942, Birchmere Properties Limited, Ontario Company 54040, Birchmere, Ontario Company 12859539, Gordon Smith, Norman Smith (Respondents)

2992-92-R: United Steelworkers of America (Applicant) v. Shrader Canada Limited (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

2915-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. 947465 Ontario Limited c.o.b. as Voyageur Limousine and Van Service/Checker Limousine and Airport Service (Respondents) (*Withdrawn*)

2917-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. C.A.A. Travel Elgin-Norfolk (Respondent) (*Withdrawn*)

2919-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. Central Chevrolet Oldsmobile Incorporated London (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3166-91-R: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canadian Tire Corporation Limited and Tantalus Construction Company Limited (Respondents) (*Withdrawn*)

3876-91-R: Labourers International Union of North America, Local 493 (Applicant) v. Penage Construction Ltd., Dalron Construction Limited (Respondents) (*Withdrawn*)

0460-92-R; 2317-92-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited and 971036 Ontario Ltd. (Respondents); International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited and 971036 Ontario Ltd. and Windsor Joist Mfg. Inc. (Respondents) (*Withdrawn*)

0946-92-R: Sheet Metal Workers' International Association, Local 473 (Applicant) v. 397026 Ontario Limited c.o.b. as Ambient Systems; 885396 Ontario Limited c.o.b. as Indco Air Systems (Respondents)

0957-92-R: Ontario Public Service Employees' Union (Applicant) v. Crown in Right of Ontario - Ministry of Consumer and Commercial Relations, Teranet Land Information Services Inc., Real/Data Ontario Inc., Landata International Services Inc., S.H.L. Systemhouse Inc., E.D.S. of Canada Ltd., Peat Marwick Stephenson Kellogg, Intergraph Canada Ltd. (Respondents) (*Withdrawn*)

1813-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Gorf Contracting Limited and Gorf Contracting (1982) Ltd. (Respondents) (*Granted*)

2262-92-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Drycoustics Construction Limited and 773784 Ontario Limited (Respondents) (*Withdrawn*)

2495-92-R: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. California Concrete and 974193 Ontario Inc. (Respondent) (*Granted*)

2614-92-R: The Ontario District Council of the International Ladies Garment Workers Union composed of Locals 14, 83 and 92 (Applicant) v. 734975 Ontario Ltd. c.o.b. as Sevil Fashions and/ or 989192 Ontario Inc. c.o.b. as Aries II (Respondents) (*Withdrawn*)

2637-92-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aspen Interiors Systems Inc. and Lorcon Contracting Inc. (Respondents) (*Granted*)

2750-92-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. B & N Finish Carpentry Ltd. and M.T.S. Carpentry Ltd. (Respondents) (*Granted*)

SALE OF A BUSINESS

3876-91-R: Labourers International Union of North America, Local 493 (Applicant) v. Penage Construction Ltd., Dalron Construction Limited (Respondents) (*Withdrawn*)

0460-92-R; 2317-92-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited and 971036 Ontario Ltd. (Respondents); International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited and 971036 Ontario Ltd. and Windsor Joist Mfg. Inc. (Respondents) (*Withdrawn*)

0946-92-R: Sheet Metal Workers' International Association, Local 473 (Applicant) v. 397026 Ontario Limited c.o.b. as Ambient Systems; 885396 Ontario Limited c.o.b. as Indco Air Systems (Respondents) (*Withdrawn*)

0957-92-R: Ontario Public Service Employees' Union (Applicant) v. Crown in Right of Ontario - Ministry of Consumer and Commercial Relations, Teranet Land Information Services Inc., Real/Data Ontario Inc., Landata International Services Inc., S.H.L. Systemhouse Inc., E.D.S. of Canada Ltd., Peat Marwick Stephenson Kellogg, Intergraph Canada Ltd. (Respondents) (*Withdrawn*)

1814-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Gorf Contracting Limited and Gorf Contracting (1982) Ltd. (Respondents) (*Dismissed*)

2263-92-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Drycoustics Construction Limited and 773784 Ontario Limited (Respondents) (*Withdrawn*)

2495-92-R: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. California Concrete and 974193 Ontario Inc. (Respondent) (*Granted*)

2614-92-R: The Ontario District Council of the International Ladies Garment Workers Union composed of Locals 14, 83 and 92 (Applicant) v. 734975 Ontario Ltd. c.o.b. as Sevil Fashions and/ or 989192 Ontario Inc. c.o.b. as Aries II (Respondents) (*Withdrawn*)

2634-92-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aspen Interiors Systems Inc. and Lorcon Contracting Inc. (Respondents) (*Granted*)

2751-92-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. B & N Finish Carpentry Ltd. and M.T.S. Carpentry Ltd. (Respondents) (*Granted*)

2961-92-R: Labourers International Union of North America, Local 183 (Applicant) v. Pacific Building Maintenance Ltd., Dynamic Maintenance Ltd. (Respondents) (*Granted*)

CROWN TRANSFER ACT

2476-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services, and St. Leonard's Society of Metropolitan Toronto (Respondents) (*Dismissed*)

2477-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services, and Community Liaison Services (Respondents) (*Dismissed*)

2478-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as Represented by the Ministry of Correctional Services, and Black Inmates and Friends Assembly (Respondents) (*Dismissed*)

2479-89-R; 2480-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services, and Streetlink Incorporated (Respondents) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0385-92-R: Gord Wiens (Applicant) v. International Brotherhood of Electrical Workers and IBEW Construction Council of Ontario (Respondent) v. W. & W. Electric Inc., c.o.b. as Albern Electric (Intervener) (6 employees in unit) (*Dismissed*)

2060-92-R: Hak Dith, Sambo Dith, George Emrich, Jim Gelson, Bill Hanna, Chin Louangxay, Armand Nadeau, David Nadeau and Zoltan Szanto (Applicants) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union (Respondent) v. Niagara Bronze Limited (Intervener) Unit: "all employees of Niagara Bronze Limited at Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, sales and office staff" (12 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	3

Number of ballots marked against respondent

7

2324-92-R: Pat Lewis (Barmish Employees) (Applicant) v. Retail, Wholesale and Department Store Union AFL:CIO:CLC (Respondent) v. Barmish Inc. (Intervener)

Unit: “all members of Barmish Inc. at Napanee, save and except supervisors, persons above the rank of supervisor, job trainers, industrial engineers, cycle checkers, designers, truck drivers, quality assurance employees, office and sales staff and persons employed for not more than 24 hours per week” (27 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	25

2336-92-R: Eric de Buda (Applicant) v. The Society of Ontario Hydro Professional and Administrative Employees (Respondent) v. Ontario Hydro, Robert S. Higgins (Interveners) (7200 employees in unit) (*Dismissed*)

2537-92-R: Fredrick Tubman (Applicant) v. I.W.A. Canada Local 1-1000, and Lajambe Forest Products Limited (Respondents)

Unit: “all employees of Lajambe Forest Products Limited at its sawmill division in the Town of Thessalon, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (7 employees in unit) (*Dismissed*)

2572-92-R: Gordon Rintoul (Applicant) v. The Canadian Brotherhood of Railway, Transport and General Workers (Respondent) v. The Corporation of the City of Kitchener (Intervener) v. Group of Employees (Objectors) (277 employees in unit) (*Dismissed*)

2578-92-R: Tri-Lake Timber Co. Ltd. employees (Bernard N. Read) (Applicant) v. Canadian Paperworkers Union and its Local 324-1 (Respondent) v. TriLake Timber Company Limited (Intervener) (22 employees in unit) (*Dismissed*)

2780-92-R: Collin P. Shelp (Applicant) v. The Retail, Wholesale and Department Store Union Local 715 (Respondent) v. Westons Bakeries Limited (Intervener) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1462-91-U; 0495-92-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Now Communications Inc. (Respondent); Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Now Communications Inc. and Alice Klein (Respondents) (*Withdrawn*)

1902-91-U: Labourers' International Union of North America, Local 607 (Applicant) v. Grant Development Corporation and/or The Ojibways of Pic River, First Nation (The Pic 50 - Heron Bay Indian Band) (Respondents) (*Granted*)

2031-91-U: Brantford Typographical Union (Applicant) v. The Expositor (Respondent) (*Terminated*)

2230-91-U: Energy and Chemical Workers Union, Local 266 (Applicant) v. St. Lawrence Cement Inc. operating as Dufferin Aggregates at their Quarry Operation, Milton, Ontario (Respondent) (*Dismissed*)

2777-91-U: Tanya Craig (Applicant) v. Aluminum, Brick and Glass Workers International Union, Local 203 and Consumers Glass (Respondents) (*Granted*)

3473-91-U: Randy C. Keyes (Applicant) v. Labourers Internatinal Union of North America, Local 1081 (Respondent) (*Dismissed*)

3535-91-U: Barbara Bartlett (Applicant) v. Local 1986 CAW FASCO Unit, Frank Emery (Respondents) v. Fasco Motors Limited (Intervener) (*Withdrawn*)

3894-91-U: Sherry Ingram (Applicant) v. Loeb IGA (Southside) (Respondent) (*Withdrawn*)

3895-91-U: Sherry Ingram (Applicant) v. U.F.C.W. Union, Susan Bayne, Ron Sprinkle (Respondents) (*Withdrawn*)

0332-92-U: Ontario Nurses' Association (Applicant) v. Public General Hospital, Chatham (Respondent) (*Withdrawn*)

0673-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The Brick Warehouse Corporation (Respondent) (*Withdrawn*)

0958-92-U: Ontario Public Service Employees' Union (Applicant) v. Crown in Right of Ontario - Ministry of Consumer and Commercial Relations, Teranet Land Information Services Inc., Real/Data Ontario Inc., Landata International Services Inc., S.H.L. Systemhouse Inc., E.D.S. of Canada Ltd., Peat Marwick Stephenson Kellogg, Intergraph Canada Ltd. (Respondents) (*Withdrawn*)

0981-92-U: Heinz Mauersberger (Applicant) v. The Canadian Union of Public Employees Local 831, (Outside Workers) (Respondent) v. The Corporation of the City of Brampton (Intervener) (*Dismissed*)

1003-92-U: The Ryerson Faculty Association (Applicant) v. The Board of Governors of Ryerson Polytechnical Institute (Respondent) (*Withdrawn*)

1131-92-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Filsinger Lumber Ltd. c.o.b. as Beaver Lumber Guelph, Ont. (Respondent) (*Withdrawn*)

1227-92-U: Oxford Lodge (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

1301-92-U: Ontario Nurses' Association (Applicant) v. Mon Sheong Home for the Aged (Respondent) (*Granted*)

1384-92-U: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Woodworking Industries (Respondent) (*Dismissed*)

1543-92-U: Sam Valewzisi (Applicant) v. Teamsters Local Union No. 230 (Respondent) (*Withdrawn*)

1555-92-U: Donald Edwards (Applicant) v. C.U.P.E. Local #3092, Reps. & Officers (Respondent) v. Whitby Ambulance Services (Bowmanville) (Intervener) (*Withdrawn*)

1585-92-U: Robert Miljure and Marjorie Campbell on their own behalf and on behalf of all other members of the Can Workers' Retiree Club (Applicant) v. Ball Packaging Products Canada, Inc. and Can Workers' Federal Union, Local 354 (Respondents) (*Dismissed*)

1596-92-U: International Union of Operating Engineers, Local 793 (Applicant) v. Tacc Construction Co. Ltd. (Respondent) (*Withdrawn*)

1704-92-U: Deny Kuoch (Applicant) v. General Foam and Cushion and CAW Local 112 (Respondents) (*Dismissed*)

1795-92-U: Wesley Jones (Applicant) v. The International Molders and Allied Workers' Union (Respondent) v. Canron Inc. (Intervener) (*Withdrawn*)

1819-92-U: Lester Dennis (Applicant) v. United Rubber, Cork, Linoleum & Plastic Workers of America Union Local 687 (Respondent) v. United Tire & Rubber Company Limited (Intervener) (*Withdrawn*)

1968-92-U; 2755-92-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Filsinger Lumber Ltd. c.o.b. as Beaver Lumber Guelph, Ont. (Respondent) (*Withdrawn*)

2045-92-U: Dale G. Butcher (Applicant) v. Teamsters Canada Local #990 and Gordon B. Filmore (Respondents) (*Dismissed*)

2049-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Hully Gully (London) Limited (Respondent) (*Withdrawn*)

2139-92-U: Service Employees International Union, Local 204 (Applicant) v. Fairview Nursing Home and Herbert Chambers and Agatha Chambers (Respondents) (*Withdrawn*)

2142-92-U: Edward Rooney (Applicant) v. Hendrickson Mfg. Canada Ltd. and United Steelworkers of America (Respondents) (*Withdrawn*)

2194-92-U: Mark Keith (Applicant) v. Bakery, Confectionery and Tobacco Workers' International Union, Local 426 (Respondent) v. Christie Brown and Co. (Division of Nabisco Brands Ltd.) (Intervener) (*Dismissed*)

2235-92-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Kona Builders Limited (Respondent) (*Withdrawn*)

2286-92-U: International Union of Operating Engineers, Local 793 (Applicant) v. Custom Concrete Northern (Respondent) (*Withdrawn*)

2287-92-U: Casual Employees of the Board of Works, for the City of Kingston (Applicant) v. Management of the City of Kingston, Canadian Union of Public Employees, C.U.P.E. Local 109 (Respondents) (*Withdrawn*)

2291-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Able Atlantic Taxi (1989) Limited (Respondent) (*Withdrawn*)

2349-92-U: Canadian Union of Public Employees Local 2484 (Applicant) v. Sunny Faces Day Care Centre (Respondent) (*Withdrawn*)

2445-92-U: Retel Jackson (Applicant) v. Lynette Barnes (Respondent) (*Withdrawn*)

2451-92-U: Labourers' International Union of North America Local 1059 (Applicant) v. M. F. Arnsby Property Management Ltd. (Respondent) (*Withdrawn*)

2526-92-U; 2896-92-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Humpty Dumpty Foods Limited (Respondent) (*Withdrawn*)

2544-92-U: George Tremblay, Ray Lavigne, Roy Totman (Applicants) v. CUPE Local 161 (Respondent) (*Withdrawn*)

2545-92-U: George Tremblay, Ray Lavigne (Applicants) v. CUPE Local 161, Laurentian Hospital (Respondents) (*Withdrawn*)

2611-92-U: Yvonne Salmon (Applicant) v. Service Employees International Union, Local 204 and S.E. (Ted) Roscoe, President Paul Simon, Business Agent (Respondent) (*Withdrawn*)

2620-92-U: Dwain Rose (Applicant) v. International Brotherhood of Boilermakers Local 637 (Respondent) (*Withdrawn*)

2649-92-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Joh Rubber (Respondent) (*Withdrawn*)

2652-92-U: Retail, Wholesale and Department Store Union (Applicant) v. Three Top Investments Holding Inc. c.o.b. as Windsor Park Hotel (Respondent) (*Withdrawn*)

2664-92-U: Bob Fil and Kaz Zgorka (Applicants) v. Ontario Top Soil (Respondent) (*Granted*)

2711-92-U: Canadian Union of Public Employees Local 3411 (Applicant) v. Turning Point Youth Services (Respondent) (*Withdrawn*)

2713-92-U: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Don Truax Sheet Metal Ltd. (Respondent) (*Withdrawn*)

2725-92-U: United Food and Commercial Workers Union, Local 175 (Applicant) v. F.H. Strasler Holding c.o.b. as Brown Bros. Funeral Homes (Respondent) (*Withdrawn*)

2736-92-U: Tom Vrantzis (Applicant) v. Employees Association of Naylor Group Incorporated and Naylor Group Incorporated (Respondents) (*Withdrawn*)

2737-92-U: Brian Farrell, Ralph Robertson, (Applicants) v. Local 67, C.U.P.E. (Respondent) (*Withdrawn*)

2738-92-U: John Manassis, Simon Tharrenos, Neal Kolesnyk, John Zaharias, Thomas Theofilopoulos (Applicants) v. The Hotel Employees Restaurant Employees, Union, Local 75 of the Hotel Employees' Restaurant Employees' International Union (Respondent) (*Withdrawn*)

2773-92-U: Labourers International Union of North America, Local 183 (Applicant) v. Karwald Industries Limited, Gerald Karker (Respondents) (*Withdrawn*)

2785-92-U: Nabil Abdelrahman (Applicant) v. Chestnut Park Hotel (Respondent) (*Withdrawn*)

2786-92-U: Nabil Abdelrahman (Applicant) v. Local 75, Best Western Chestnut Park Hotel (Respondents) (*Withdrawn*)

2789-92-U: Mr. John Maloney (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Dismissed*)

2790-92-U: Nabil Abdelrahman (Applicant) v. Chestnut Park Hotel (Respondent) (*Withdrawn*)

2791-92-U: John Morassut (Applicant) v. Local 67 C.U.P.E. (Respondent) (*Withdrawn*)

2820-92-U: Richards-Wilcox Canada Inc. (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

2821-92-U: United Food and Commercial Workers Union, Local 175 (Applicant) v. F.H. Strasler Holding c.o.b. as Brown Bros. Funeral Homes (Respondent) (*Withdrawn*)

2843-92-U: Kevin Joseph Sagriff (Applicant) v. Energy & Chemical Workers Union Local 9670A (Respondent) v. Smurfit Paper Tubes (Intervener) (*Withdrawn*)

2844-92-U: Borai Abdelrahman (Applicant) v. Chestnut Park Hotel (Respondent) (*Withdrawn*)

2845-92-U: Borai Abdelrahman (Applicant) v. Chestnut Park Hotel, David K. Nielsen, Marie McCammont (Respondents) (*Withdrawn*)

2846-92-U: Borai Abdelrahman (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 - Cledwyn Lounge (Respondent) (*Withdrawn*)

2866-92-U: Alex DeLaurier (Applicant) v. Local 251 U.A.W. Wallaceburg & Benn Iron Foundry (Respondents) (*Withdrawn*)

2871-92-U: The Board of Education for the City of Hamilton (Applicant) v. Canadian Union of Public Employees, Local 1344 (Respondent) (*Withdrawn*)

2877-92-U: Communications, Energy and Paper Workers Union of Canada (Applicant) v. Fischer-Hallman Service Center Inc. (Respondent) (*Withdrawn*)

2921-92-U: United Steelworkers of America (Applicant) v. Canadian Protection Services Limited (Respondent) (*Withdrawn*)

2948-92-U: United Food and Commercial Workers and its Local 175 (Applicant) v. Barber-Ellis Fine Papers, London, Ontario (Respondent) (*Withdrawn*)

2962-92-U: Labourers International Union of North America, Local 183 (Applicant) v. Dynamic Maintenance Ltd. (Respondent) (*Granted*)

3024-92-U: Harvey A. MacDonald (Chairman, Local 593 Oakville Plant) (Applicant) v. Ed Nelson (Administrative Vice President (Ont) C.E.P. Union) (Respondent) (*Dismissed*)

3067-92-U: Krishna Ramkissoon (Applicant) v. The Chestnut Park Hotel - David K. Nielsen - Marie McCamont (Respondents) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

2912-92-M: United Food & Commercial Workers International Union, Local 175/633 (Applicant) v. 810048 Ontario Ltd. c.o.b. as Loeb IGA Highland (Respondent) (*Granted*)

2959-92-M: Labourers International Union of North America, Local 183 (Applicant) v. Dynamic Maintenance Ltd. (Respondent) (*Granted*)

3041-92-M: United Food and Commercial Workers Union, Local 175/633 (Applicant) v. Bancroft I.G.A. (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

2717-92-U: District 48, O.S.S.T.F. (TPA Members) (Applicant) v. The Dufferin County Board of Education (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2595-92-M: Jenny Lee Connell (Applicant) v. United Food and Commercial Workers International Union, AFL-CIO-CLC (Respondent Trade Union) v. Loeb Princess Street (Respondent Employer) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2836-92-M: International Union of Operating Engineers, Local 796, and Olympia & York Developments (Applicants) (*Granted*)

JURISDICTIONAL DISPUTES

1933-90-JD: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Ellis Don Limited and Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 598 (Respondents) (*Withdrawn*)

2981-90-JD: Horton CBI, Limited (Applicant) v. Millwrights District Council of Ontario and its Local 1425, and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Withdrawn*)

1631-91-JD: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Electrical Power Systems Construction Association; Ontario Hydro; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 (Respondents) (*Withdrawn*)

1988-91-JD: Millwright District Council of Ontario, on its own behalf and on behalf of its own Local 1410 (Applicant) v. E.S. Fox Ltd., Sheet Metal Workers International Association, Local 269 (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Dismissed*)

0701-92-JD: International Association of Bridge, Structural and Ornamental Iron Workers and International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Electrical Power Systems Construction Association, Kel-Gor Limited, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Granted*)

1156-92-JD: A Council of Trade Unions acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local 183 (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, and Municipality of Metropolitan Toronto, and Targa Limited (Respondents) (*Withdrawn*)

2213-92-JD: Labourers' International Union of North America, Local 1089 (Applicant) v. Catalytic Maintenance Inc. and United Brotherhood of Carpenters and Joiners of America, Local Union 1256 (Respondents) (*Granted*)

2214-92-JD: Labourers' International Union of North America, Local 1089 (Applicant) v. Doug Chalmers Construction Limited and United Brotherhood of Carpenters and Joiners of America, Local Union 1256 (Respondents) v. Teamsters, Chauffeurs, Warehousemen & Helpers Union Local No. 880 (Intervener) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1513-92-M: CAW Local 1980 (Applicant) v. Ford Electronics Manufacturing Corporation (Respondent) (*Granted*)

1879-92-M: Fairmount Home for the Aged (Applicant) v. Canadian Union of Public Employees and its Local 2290 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3298-91-OH: Donald Redmond (Applicant) v. R.M. Belanger Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (*Dismissed*)

3757-91-OH: Shelley-Anne Moir (Applicant) v. Attridge Transportation (Respondent) (*Withdrawn*)

2003-92-OH: Rosemary Ahrens (Applicant) v. Karen Parisien (Respondent) (*Withdrawn*)

2767-92-OH: John Tait (Applicant) v. Westinghouse Canada Inc. and Mr. Fred Facca (Respondents) (*Withdrawn*)

2860-92-OH: Victor Machmer (Applicant) v. Frank Villecco (Respondent) (*Terminated*)

CONSTRUCTION INDUSTRY GRIEVANCES

0794-90-G: Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1425 (Applicant) v. Horton C.B.I. Ltd. (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Intervener) (*Withdrawn*)

1331-90-G; 2032-90-G: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Ellis-Don Construction Limited (Respondent) v. Labourers' International Union of North America, Local Union 1059 (Intervener); Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Ellis-Don Construction Limited (Respondent) (*Withdrawn*)

2700-91-G: International Union of Operating Engineers and its Local 793 (Applicant) v. Delmar Contracting Limited (Respondent) (*Granted*)

3877-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Municipality of Metropolitan Toronto (Respondent) v. A Council of Trade Unions acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local 183, The Metropolitan Toronto Sewer and Watermain Contractors Association (Interveners) (*Withdrawn*)

0285-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited (Respondent) (*Withdrawn*)

0665-92-G: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Ellis Don Construction Limited (Respondent) (*Withdrawn*)

0944-92-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Crestview Masonry Co. Ltd. (Respondent) (*Granted*)

1026-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pave Al Limited (Respondent) (*Withdrawn*)

1342-92-G; 1952-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cripps Welding of Windsor Limited (Respondent) (*Withdrawn*)

1586-92-G: Marble, Tile & Terrazzo Local #31 affiliated with the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Aldershot Flooring Limited (Respondent) (*Granted*)

1792-92-G: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7 CANADA (Applicant) v. Baur Ceramic Ltd. (Respondent) (*Granted*)

1871-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Marine Banister (A Joint Venture) (Respondent) (*Withdrawn*)

1872-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Snow Valley Contracting Ltd. (Respondent) (*Withdrawn*)

2187-92-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Hugo Hintz Construction Ltd. (Respondent) (*Granted*)

2255-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Norm Brandon Ltd. (Respondent) (*Granted*)

2260-92-G; 2261-92-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. 773784 Ontario Limited (Respondent); United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Drycoustics Construction Limited (Respondent) (*Withdrawn*)

2393-92-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Bradall Mechanical Ltd. (Respondent) (*Granted*)

2397-92-G: Sheet Metal Workers' International Association Local Union No. 30 (Applicant) v. Master Clad Inc. (Master Clad R/D&S) (Respondent) (*Granted*)

2462-92-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Armbro Materials & Construction Ltd. (Respondent) (*Withdrawn*)

2476-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. Twinborn Construction (Paving) Limited (Respondent) (*Granted*)

2516-92-G; 2517-92-G: Drywall Lathing and Insulation, Local 675 (Applicant) v. Aspen Interiors Systems Ltd. (Respondent); Drywall Acoustic Lathing and Insulation, Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aspen Interiors Systems Ltd. (Respondent) (*Granted*)

2555-92-G: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. California Concrete and 974193 Ontario Inc. (Respondents) (*Granted*)

2615-92-G: Sheet Metal Workers' International Association, Local 473 (Applicant) v. 397026 Ontario Limited c.o.b. as Ambient Systems; 885396 Ontario Limited c.o.b. as Indco Air Systems (Respondents) (*Withdrawn*)

2635-92-G; 2636-92-G: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aspen Interiors Systems Inc. and Lorcon Contracting Inc. (Respondents) (*Granted*)

2646-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Trimwood Interiors Inc. (Respondent) (*Withdrawn*)

2648-92-G; 2874-92-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Friedhelm H. Rose (Respondent) (*Granted*)

2654-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Albern Mechanical Ltd. (Respondent) (*Granted*)

2655-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Donald A. Burke, c.o.b. as MDB Mechanical Contractors (Respondent) (*Granted*)

2675-92-G: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Anmar Mechanical and Electrical Contractors Limited (Respondent) (*Granted*)

2678-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Cot 2i Tank Erectors Inc. (Respondent) (*Withdrawn*)

2701-92-G: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Limen Masonry Limited (Respondent) (*Withdrawn*)

2724-92-G: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1590 (Ap-

plicant) v. VTC Industrial Coatings Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (*Withdrawn*)

2735-92-G: Labourers' International Union of North America, Local 837 (Applicant) v. Wentworth Lincoln Excavating Ltd. (Respondent) (*Granted*)

2752-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. B & N Finish Carpentry Ltd. (Respondent) (*Granted*)

2758-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Simplex Electric, A Division of 488827 Ontario Limited (Respondent) (*Withdrawn*)

2777-92-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Mavi Drywall Systems Ltd. (Respondent) (*Granted*)

2796-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. IPCF Construction (Respondent) (*Granted*)

2799-92-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen - Local 8 (Applicant) v. Joseph Magee Masonry Inc. (Respondent) (*Granted*)

2810-92-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Nelco Mechanical Limited (Respondent) (*Withdrawn*)

2825-92-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. J.P.R. Construction (Respondent) (*Granted*)

2826-92-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. D'Arcy Sweeney Limited (Respondent) (*Withdrawn*)

2829-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. All Wood Contracting (Respondent) (*Withdrawn*)

2830-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Blvd Forming Ltd. (Respondent) (*Withdrawn*)

2831-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Varamae Construction (Respondent) (*Withdrawn*)

2832-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sofam Installations Ltd. (Respondent) (*Withdrawn*)

2833-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mississauga Cement Forming Ltd. (Respondent) (*Withdrawn*)

2852-92-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Manny's Construction Limited (Respondent) (*Granted*)

2872-92-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Don Truax Sheet Metal Ltd. (Respondent) (*Granted*)

2875-92-G: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Parity Drywall (Respondent) (*Granted*)

2883-92-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the

International Brotherhood of Painters and Allied Trades Local 1494 (Applicant) v. Apex Painters & Contractors Inc. (Respondent) (*Granted*)

2889-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Coco Paving Inc. (Respondent) (*Withdrawn*)

2890-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Lasalle Backhoe Service Division of Winkup Construction Limited (Respondent) (*Granted*)

2891-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Wentworth - Lincoln Excavating, A Division of Wentworth-Lincoln Landscaping Ltd. (Respondent) (*Granted*)

2892-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Limited (Respondent) (*Withdrawn*)

2897-92-G; 2898-92-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. P. J. Daly Ltd. (Respondent) (*Withdrawn*)

2899-92-G: United Brotherhood of Carpenters & Joiners of America Local 785 (Applicant) v. Con-Eng Contractors Inc. (Respondent) (*Withdrawn*)

2906-92-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Unic Drywall Ltd. (Respondent) (*Granted*)

2928-92-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Light-Mar Electrical and/or Enerlite Electric (Respondents) (*Granted*)

2931-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. MDB Mechanical Contractors (Respondent) (*Withdrawn*)

2932-92-G: Christian Labour Association of Canada, Local 6 (Applicant) v. Allan Michaels Electric Ltd. (Respondent) (*Granted*)

2935-92-G; 2936-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. E.D. Scaffold Service Ltd. (Respondent) (*Granted*)

2967-92-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

2985-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ballan Construction Ltd. (Respondent) (*Withdrawn*)

2987-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Machinery Movers Ltd. (Respondent) (*Granted*)

3004-92-G: Christian Labour Association of Canada, Local 6 (Applicant) v. Canral Electric Ltd. (Respondent) (*Granted*)

3019-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. 877138 Ontario Inc. o/a Bud's Contracting (Respondent) (*Granted*)

3063-92-G: Christian Labour Association of Canada, Local 6 (Applicant) v. Schaible Electric Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1542-84-U: Reuben Johnson (Applicant) v. United Electrical, Radio and Machine Workers of Canada (UE) (Travailleurs Unis De L'Electricite, Radio et Machinerie du Canada (TUE) (Respondent) (*Dismissed*)

3092-90-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Delsan Demolition (Respondent) v. Labourers' International Union of North America, Local 506 and Labourers' International Union of North America, Ontario Provincial District Council (Intervenors) (*Terminated*)

1820-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Conestoga Meat Packers Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

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March 1993



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**A Monthly Series of Decisions from the
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Selected decisions of particular reference value are
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CASES REPORTED

1.	Cooper Industries (Canada) Inc. c.o.b. as Wagner Division of Cooper Industries (Canada) Inc.; Re United Steelworkers of America	157
2.	Hemlo Gold Mines Inc.; Re United Steelworkers of America; Re Group of Employees.....	158
3.	Kitchener Waterloo Hospital; Re ONA; Re Group of Employees	187
4.	Loeb Highland, 810048 Ontario Limited c.o.b. as; Re UFCW, Local 175/633	197
5.	Loeb IGA Highland, 810048 Ontario Ltd. c.o.b. as; Re UFCW, Local 175/633	208
6.	Metropolitan Toronto Apartment Builders Association and LIUNA, Local 183; Re BAC, Local 2; Re Metropolitan Industrial & Commercial Masonry Contractors Inc.; Re Masonry Contractors Association of Toronto Inc.	219
7.	Morrison's Meat Packers Ltd.; Re UAW	226
8.	Ontario Hydro, EPSCA, LIUNA, Local 1059; Re Ontario Sheet Metal Workers' & Roofers' Conference, SMW, Local 473	227
9.	Penny Lane Food Markets Ltd.; Re UFCWU, Local 175/633; Re Group of Employees	230
10.	Reynolds-Lemmerz Industries; Re National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)	242
11.	Shrader Canada Limited; Re United Steelworkers of America; Re Group of Employees.....	246
12.	Tate Andale Canada Inc.; Re USWA	254
13.	Vic West Steel, CJA, Local 1256; Re Ontario Sheet Metal Workers' and Roofers' Conference and SMW, Local 539; Re Ontario Sheet Metal and Air Handling Group.....	256

COURT PROCEEDINGS

1.	Boeing Canada/De Havilland Division and Susan A. Tacon, John A. Ronson and David A. Patterson and OLRB; Re Jill Bettes	275
2.	Electrical Power Systems Construction Association, The; Re Ontario Allied Construction Trades Council, HFIA, Local 95, James Cord, and The OLRB	276

SUBJECT INDEX

- Adjournment - Evidence - Jurisdictional Dispute - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists
- VIC WEST STEEL, CJA, LOCAL 1256; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE AND SMW, LOCAL 539; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP 256
- Adjournment - Practice and Procedure - Unfair Labour Practice - Parties agreeing to *sine die* adjournment of unfair labour practice complaint in which union had requested expedited hearing under section 92.2 of the *Act* - Board taking union's adjournment request to be withdrawal of request for expedited hearing - Board granting *sine die* adjournment, but for period not to exceed three months
- COOPER INDUSTRIES (CANADA) INC. C.O.B. AS WAGNER DIVISION OF COOPER INDUSTRIES (CANADA) INC.; RE UNITED STEELWORKERS OF AMERICA 157
- Bargaining Unit - Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Petition - Board relying on section 8(4) of the *Act* and Rule 47 of the Rules of Procedure in declining to receive untimely employee evidence of objection - Employer and objecting employees raising allegations with respect to method of collection of memberships by union - Board declining to inquire into certain matters not sufficiently particularized and determining that other allegations not causing Board to doubt reliability of membership evidence - Board applying *Hospital for Sick Children* test and determining that employees of separate division or department properly falling within applied for bargaining unit - Interim certificate issuing
- SHRADER CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES 246
- Bargaining Rights - Construction Industry - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Bricklayers' union Local 2 alleging that Builders Association, Labourers' union and others committing unfair labour practice by, *inter alia*, agreeing to sub-contracting clause in collective agreement between them requiring bricklaying work to be performed by companies bound to agreement with Labourers' union or Bricklayers' union Local 1 - Local 2 requesting that operation of sub-contracting clause be stayed pending resolution of unfair labour practice complaint - Board commenting on lack of particularity and absence of supporting facts establishing first-hand knowledge in declaration filed by Local 2 - Board also noting that interim relief applications may be decided without oral hearings and that parties who fail to provide complete written representations, as required by Rule 86, do so at their peril - Only very discrete core of Local 2's complaint supporting arguable

case - Board considering delay in starting proceedings - No obvious reason why harm to Local 2 of denying application outweighing harm to responding parties of staying sub-contracting provision - Application for interim order dismissed

METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION AND LIUNA, LOCAL 183; RE BAC, LOCAL 2; RE METROPOLITAN INDUSTRIAL & COMMERCIAL MASONRY CONTRACTORS INC.; RE MASONRY CONTRACTORS ASSOCIATION OF TORONTO INC.

219

Bargaining Rights - Remedies - Sale of a Business - Unfair Labour Practice - Board, in earlier decision, declaring that sale of a business occurred but that bargaining rights terminated and that collective agreement no longer binding - Parties disputing effective date of declaration - Board considering it appropriate to make declaration effective as of date of "sale", as if transaction never occurred, and so directing - Board also ruling on parameters of available relief in connection with earlier finding that employer had violated section 67 of the *Act* - Alternate Chair appointed to meet with parties and assist them in resolving outstanding issues

KITCHENER WATERLOO HOSPITAL; RE ONA; RE GROUP OF EMPLOYEES

187

Bargaining Rights - Sale of a Business - All events material to application occurring prior to coming into force on January 1, 1993 of amendments to *Labour Relations Act*, including amendments to section 64 - Board hearing held after January 1, 1993 - Board applying section 64, as it existed prior to amendments, to facts of the case - Responding employer owning and operating retail food store previously owned and operated as retail food store by A & P - Store directly sub-let by A & P to responding employer - Even if result could be said to be expansion of responding employer's existing business, result accomplished through acquisition of part of A & P's business - Transaction constituting sale of business within meaning of the *Act* - Declaration issuing

PENNY LANE FOOD MARKETS LTD.; RE UFCWU, LOCAL 175/633; RE GROUP OF EMPLOYEES

230

Certification - Bargaining Unit - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Petition - Board relying on section 8(4) of the *Act* and Rule 47 of the Rules of Procedure in declining to receive untimely employee evidence of objection - Employer and objecting employees raising allegations with respect to method of collection of memberships by union - Board declining to inquire into certain matters not sufficiently particularized and determining that other allegations not causing Board to doubt reliability of membership evidence - Board applying *Hospital for Sick Children* test and determining that employees of separate division or department properly falling within applied for bargaining unit - Interim certificate issuing

SHRADER CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

246

Certification - Charter of Rights and Freedoms - Constitutional Law - Natural Justice - Petition - Representation Vote - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the *Act* and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3)

of the *Act* to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing

HEMLO GOLD MINES INC.; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

158

Charges - Bargaining Unit - Certification - Evidence - Intimidation and Coercion - Membership Evidence - Petition - Board relying on section 8(4) of the *Act* and Rule 47 of the Rules of Procedure in declining to receive untimely employee evidence of objection - Employer and objecting employees raising allegations with respect to method of collection of memberships by union - Board declining to inquire into certain matters not sufficiently particularized and determining that other allegations not causing Board to doubt reliability of membership evidence - Board applying *Hospital for Sick Children* test and determining that employees of separate division or department properly falling within applied for bargaining unit - Interim certificate issuing

SHRADER CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

246

Charter of Rights and Freedoms - Certification - Constitutional Law - Natural Justice - Petition - Representation Vote - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the *Act* and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3) of the *Act* to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing

HEMLO GOLD MINES INC.; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

158

Constitutional Law - Certification - Charter of Rights and Freedoms - Natural Justice - Petition - Representation Vote - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the *Act* and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3) of the *Act* to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing

HEMLO GOLD MINES INC.; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

158

Construction Industry - Bargaining Rights - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Bricklayers' union Local 2 alleging that Builders Association, Labourers' union and others committing unfair labour practice by, *inter alia*, agreeing to sub-contracting clause in collective agreement between them requiring bricklaying work to be performed by companies bound to agreement with Labourers' union or Bricklayers' union Local 1 - Local 2 requesting that operation of sub-contacting clause be stayed pending resolution of unfair labour practice complaint - Board commenting on lack of particularity and

IV

absence of supporting facts establishing first-hand knowledge in declaration filed by Local 2 - Board also noting that interim relief applications may be decided without oral hearings and that parties who fail to provide complete written representations, as required by Rule 86, do so at their peril - Only very discrete core of Local 2's complaint supporting arguable case - Board considering delay in starting proceedings - No obvious reason why harm to Local 2 of denying application outweighing harm to responding parties of staying sub-contracting provision - Application for interim order dismissed

METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION AND LIUNA, LOCAL 183; RE BAC, LOCAL 2; RE METROPOLITAN INDUSTRIAL & COMMERCIAL MASONRY CONTRACTORS INC.; RE MASONRY CONTRACTORS ASSOCIATION OF TORONTO INC.....

219

Construction Industry - Construction Industry Grievance - Damages - Judicial Review - Remedies - Employer grieving against union and employee alleging improper claim and receipt of room and board allowance by employee - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing - Employer seeking judicial review - Divisional Court ruling that Board declined its jurisdiction to consider award of damages against the employee and remitting matter to the Board for its determination

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, HFIA, LOCAL 95, JAMES CORD, AND THE OLRB

276

Construction Industry Grievance - Construction Industry - Damages - Judicial Review - Remedies - Employer grieving against union and employee alleging improper claim and receipt of room and board allowance by employee - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing - Employer seeking judicial review - Divisional Court ruling that Board declined its jurisdiction to consider award of damages against the employee and remitting matter to the Board for its determination

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, HFIA, LOCAL 95, JAMES CORD, AND THE OLRB

276

Damages - Construction Industry - Construction Industry Grievance - Judicial Review - Remedies - Employer grieving against union and employee alleging improper claim and receipt of room and board allowance by employee - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing - Employer seeking judicial review - Divisional Court ruling that Board declined its jurisdiction to consider award of damages against the employee and remitting matter to the Board for its determination

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, HFIA, LOCAL 95, JAMES CORD, AND THE OLRB

276

Discharge - Discharge for Union Activity - Evidence - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union *animus* and claiming that discharge motivated by employee having lied to management about theft commit-

ted by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and declarations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

LOEB HIGHLAND, 810048 ONTARIO LIMITED C.O.B. AS; RE UFCW, LOCAL 175/633.....

197

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Board directing employer to reinstate employees on an interim basis pending disposition of their unfair labour practice discharge complaint - Employer also directed to post Board notice in workplace and to provide copies of notice to employees affected by union's certification application

TATE ANDALE CANADA INC.; RE USWA.....

254

Discharge - Discharge for Union Activity - Evidence - Practice and Procedure - Unfair Labour Practice - Employer claiming that employee discharged for having lied to management about theft committed by another employee - Union objecting to introduction of evidence about "similar incident" involving other employee on ground that it pertained to material fact which had not been set out in employer's response - Board relying on Rule 20 of Board's Rules of Procedure to uphold objection - Discharge tainted by anti-union *animus* - Board finding that employer violated the Act when it met with employee to discuss his organizing activities and when the employee was discharged - Reinstatement with compensation ordered

LOEB IGA HIGHLAND, 810048 ONTARIO LTD. C.O.B. AS; RE UFCW, LOCAL 175/633.....

208

Discharge for Union Activity - Discharge - Evidence - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union *animus* and claiming that discharge motivated by employee having lied to management about theft committed by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and declarations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

LOEB HIGHLAND, 810048 ONTARIO LIMITED C.O.B. AS; RE UFCW, LOCAL 175/633.....

197

Discharge for Union Activity - Discharge - Evidence - Practice and Procedure - Unfair Labour Practice - Employer claiming that employee discharged for having lied to management about theft committed by another employee - Union objecting to introduction of evidence about "similar incident" involving other employee on ground that it pertained to material fact which had not been set out in employer's response - Board relying on Rule 20 of Board's Rules of Procedure to uphold objection - Discharge tainted by anti-union *animus* - Board finding that employer violated the Act when it met with employee to discuss his

organizing activities and when the employee was discharged - Reinstatement with compensation ordered	
LOEB IGA HIGHLAND, 810048 ONTARIO LTD. C.O.B. AS; RE UFCW, LOCAL 175/633.....	208
Discharge for Union Activity - Discharge - Interim Relief - Remedies - Unfair Labour Practice - Board directing employer to reinstate employees on an interim basis pending disposition of their unfair labour practice discharge complaint - Employer also directed to post Board notice in workplace and to provide copies of notice to employees affected by union's certification application	
TATE ANDALE CANADA INC.; RE USWA.....	254
Evidence - Adjournment - Jurisdictional Dispute - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists	
VIC WEST STEEL, CJA, LOCAL 1256; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE AND SMW, LOCAL 539; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP	256
Evidence - Bargaining Unit - Certification - Charges - Intimidation and Coercion - Membership Evidence - Petition - Board relying on section 8(4) of the Act and Rule 47 of the Rules of Procedure in declining to receive untimely employee evidence of objection - Employer and objecting employees raising allegations with respect to method of collection of memberships by union - Board declining to inquire into certain matters not sufficiently particularized and determining that other allegations not causing Board to doubt reliability of membership evidence - Board applying <i>Hospital for Sick Children</i> test and determining that employees of separate division or department properly falling within applied for bargaining unit - Interim certificate issuing	
SHRADER CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES	246
Evidence - Discharge - Discharge for Union Activity - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union <i>animus</i> and claiming that discharge motivated by employee having lied to management about theft committed by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and declarations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm	

from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

LOEB HIGHLAND, 810048 ONTARIO LIMITED C.O.B. AS; RE UFCW, LOCAL 175/633.....

197

Evidence - Discharge - Discharge for Union Activity - Practice and Procedure - Unfair Labour Practice - Employer claiming that employee discharged for having lied to management about theft committed by another employee - Union objecting to introduction of evidence about "similar incident" involving other employee on ground that it pertained to material fact which had not been set out in employer's response - Board relying on Rule 20 of Board's Rules of Procedure to uphold objection - Discharge tainted by anti-union *animus* - Board finding that employer violated the Act when it met with employee to discuss his organizing activities and when the employee was discharged - Reinstatement with compensation ordered

LOEB IGA HIGHLAND, 810048 ONTARIO LTD. C.O.B. AS; RE UFCW, LOCAL 175/633.....

208

Evidence - Practice and Procedure - Unfair Labour Practice - Board not permitting counsel to pursue line of questioning where application did not particularize any of the facts on which the union was seeking to cross-examine

MORRISON'S MEAT PACKERS LTD.; RE UAW

226

Health and Safety - Judicial Review - Employee citing second-hand tobacco smoke in work refusal - Board finding health and safety not real reason for refusal and that employer discipline not unlawful in circumstances - Complaint dismissed - Employee seeking judicial review on ground that members' conduct give rise to reasonable apprehension of bias - Employee issuing summons to witness to Board member to secure evidence for use in judicial review application - Motions court judge concluding that summons an abuse of process and quashing it - Three-judge panel of Divisional Court upholding decision of motions judge and dismissing motion to set decision aside

BOEING CANADA/DE HAVILLAND DIVISION AND SUSAN A. TACON, JOHN A. RONSON AND DAVID A. PATTERSON AND OLRB; RE JILL BETTES.....

275

Interim Relief - Bargaining Rights - Construction Industry - Practice and Procedure - Remedies - Unfair Labour Practice - Bricklayers' union Local 2 alleging that Builders Association, Labourers' union and others committing unfair labour practice by, *inter alia*, agreeing to sub-contracting clause in collective agreement between them requiring bricklaying work to be performed by companies bound to agreement with Labourers' union or Bricklayers' union Local 1 - Local 2 requesting that operation of sub-contracting clause be stayed pending resolution of unfair labour practice complaint - Board commenting on lack of particularity and absence of supporting facts establishing first-hand knowledge in declaration filed by Local 2 - Board also noting that interim relief applications may be decided without oral hearings and that parties who fail to provide complete written representations, as required by Rule 86, do so at their peril - Only very discrete core of Local 2's complaint supporting arguable case - Board considering delay in starting proceedings - No obvious reason why harm to Local 2 of denying application outweighing harm to responding parties of staying sub-contracting provision - Application for interim order dismissed

METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION AND LIUNA, LOCAL 183; RE BAC, LOCAL 2; RE METROPOLITAN INDUSTRIAL & COMMERCIAL MASONRY CONTRACTORS INC.; RE MASONRY CONTRACTORS ASSOCIATION OF TORONTO INC.....

219

Interim Relief - Discharge - Discharge for Union Activity - Remedies - Unfair Labour Practice - Board directing employer to reinstate employees on an interim basis pending disposition of

VIII

their unfair labour practice discharge complaint - Employer also directed to post Board notice in workplace and to provide copies of notice to employees affected by union's certification application

TATE ANDALE CANADA INC.; RE USWA..... 254

Interim Relief - Discharge - Discharge for Union Activity - Evidence - Practice and Procedure - Remedies - Unfair Labour Practice - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union *animus* and claiming that discharge motivated by employee having lied to management about theft committed by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and declarations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

LOEB HIGHLAND, 810048 ONTARIO LIMITED C.O.B. AS; RE UFCW, LOCAL 175/633..... 197

Interim Relief - Interference in Trade Unions - Practice and Procedure - Remedies - Unfair Labour Practice - Union alleging that employer interfering with organizing drive by posting and distributing certain letter to employees - Board considering whether complaint making out arguable case and also assessing relative harm of granting or withholding relief - Board aiming to preserve union's right to meaningful remedy, should complaint be upheld, while intruding as little as possible on employer's interests - Employer directed to remove letter from any area in which it was posted and to refrain from communication with employees involving counselling workers to resign union membership - Board's order effective until disposition or settlement of complaint

REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA)..... 242

Interference in Trade Unions - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Union alleging that employer interfering with organizing drive by posting and distributing certain letter to employees - Board considering whether complaint making out arguable case and also assessing relative harm of granting or withholding relief - Board aiming to preserve union's right to meaningful remedy, should complaint be upheld, while intruding as little as possible on employer's interests - Employer directed to remove letter from any area in which it was posted and to refrain from communication with employees involving counselling workers to resign union membership - Board's order effective until disposition or settlement of complaint

REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA)..... 242

Intimidation and Coercion - Bargaining Unit - Certification - Charges - Evidence - Membership Evidence - Petition - Board relying on section 8(4) of the Act and Rule 47 of the Rules of Procedure in declining to receive untimely employee evidence of objection - Employer and objecting employees raising allegations with respect to method of collection of memberships by union - Board declining to inquire into certain matters not sufficiently particularized and determining that other allegations not causing Board to doubt reliability of mem-

bership evidence - Board applying *Hospital for Sick Children* test and determining that employees of separate division or department properly falling within applied for bargaining unit - Interim certificate issuing

SHRADER CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA;
RE GROUP OF EMPLOYEES

246

Judicial Review - Construction Industry - Construction Industry Grievance - Damages - Remedies
- Employer grieving against union and employee alleging improper claim and receipt of room and board allowance by employee - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing - Employer seeking judicial review - Divisional Court ruling that Board declined its jurisdiction to consider award of damages against the employee and remitting matter to the Board for its determination

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ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, HFIA, LOCAL 95,
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276

Judicial Review - Health and Safety - Employee citing second-hand tobacco smoke in work refusal - Board finding health and safety not real reason for refusal and that employer discipline not unlawful in circumstances - Complaint dismissed - Employee seeking judicial review on ground that members' conduct give rise to reasonable apprehension of bias - Employee issuing summons to witness to Board member to secure evidence for use in judicial review application - Motions court judge concluding that summons an abuse of process and quashing it - Three-judge panel of Divisional Court upholding decision of motions judge and dismissing motion to set decision aside

BOEING CANADA/DE HAVILLAND DIVISION AND SUSAN A. TACON, JOHN
A. RONSON AND DAVID A. PATTERSON AND OLRB; RE JILL BETTES

275

Jurisdictional Dispute - Adjournment - Evidence - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists

VIC WEST STEEL, CJA, LOCAL 1256; RE ONTARIO SHEET METAL WORKERS'
AND ROOFERS' CONFERENCE AND SMW, LOCAL 539; RE ONTARIO SHEET
METAL AND AIR HANDLING GROUP

256

Jurisdictional Dispute - Practice and Procedure - Parties disputing assignment of work in connection with removal for scrap of exterior metal siding - Board declaring that work in dispute should be assigned to Sheet Metal Workers' union - Board observing that "kitchen sink" approach to preparation of briefs in jurisdictional dispute complaints not particularly helpful - Board noting that parties in this case could properly have focused on the practice relat-

ing specifically to the work in dispute and the application of the employer's policy with respect to the assignment of such work

ONTARIO HYDRO, EPSCA, LIUNA, LOCAL 1059; RE ONTARIO SHEET METAL WORKERS' & ROOFERS' CONFERENCE, SMW, LOCAL 473.....

227

Membership Evidence - Bargaining Unit - Certification - Charges - Evidence - Intimidation and Coercion - Petition - Board relying on section 8(4) of the Act and Rule 47 of the Rules of Procedure in declining to receive untimely employee evidence of objection - Employer and objecting employees raising allegations with respect to method of collection of memberships by union - Board declining to inquire into certain matters not sufficiently particularized and determining that other allegations not causing Board to doubt reliability of membership evidence - Board applying *Hospital for Sick Children* test and determining that employees of separate division or department properly falling within applied for bargaining unit - Interim certificate issuing

SHRADER CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

246

Natural Justice - Certification - Charter of Rights and Freedoms - Constitutional Law - Petition - Representation Vote - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the *Act* and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3) of the *Act* to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing

HEMLO GOLD MINES INC.; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

158

Petition - Bargaining Unit - Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Board relying on section 8(4) of the Act and Rule 47 of the Rules of Procedure in declining to receive untimely employee evidence of objection - Employer and objecting employees raising allegations with respect to method of collection of memberships by union - Board declining to inquire into certain matters not sufficiently particularized and determining that other allegations not causing Board to doubt reliability of membership evidence - Board applying *Hospital for Sick Children* test and determining that employees of separate division or department properly falling within applied for bargaining unit - Interim certificate issuing

SHRADER CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

246

Petition - Certification - Charter of Rights and Freedoms - Constitutional Law - Natural Justice - Representation Vote - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the *Act* and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3)

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HEMLO GOLD MINES INC.; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

158

Practice and Procedure - Adjournment - Evidence - Jurisdictional Dispute - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists

VIC WEST STEEL, CJA, LOCAL 1256; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE AND SMW, LOCAL 539; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP

256

Practice and Procedure - Adjournment - Unfair Labour Practice - Parties agreeing to *sine die* adjournment of unfair labour practice complaint in which union had requested expedited hearing under section 92.2 of the *Act* - Board taking union's adjournment request to be withdrawal of request for expedited hearing - Board granting *sine die* adjournment, but for period not to exceed three months

COOPER INDUSTRIES (CANADA) INC. C.O.B. AS WAGNER DIVISION OF COOPER INDUSTRIES (CANADA) INC.; RE UNITED STEELWORKERS OF AMERICA

157

Practice and Procedure - Bargaining Rights - Construction Industry - Interim Relief - Remedies - Unfair Labour Practice - Bricklayers' union Local 2 alleging that Builders Association, Labourers' union and others committing unfair labour practice by, *inter alia*, agreeing to sub-contracting clause in collective agreement between them requiring bricklaying work to be performed by companies bound to agreement with Labourers' union or Bricklayers' union Local 1 - Local 2 requesting that operation of sub-contracting clause be stayed pending resolution of unfair labour practice complaint - Board commenting on lack of particularity and absence of supporting facts establishing first-hand knowledge in declaration filed by Local 2 - Board also noting that interim relief applications may be decided without oral hearings and that parties who fail to provide complete written representations, as required by Rule 86, do so at their peril - Only very discrete core of Local 2's complaint supporting arguable case - Board considering delay in starting proceedings - No obvious reason why harm to Local 2 of denying application outweighing harm to responding parties of staying sub-contracting provision - Application for interim order dismissed

METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION AND LIUNA, LOCAL 183; RE BAC, LOCAL 2; RE METROPOLITAN INDUSTRIAL & COMMERCIAL MASONRY CONTRACTORS INC.; RE MASONRY CONTRACTORS ASSOCIATION OF TORONTO INC.

219

Practice and Procedure - Discharge - Discharge for Union Activity - Evidence - Interim Relief - Remedies - Unfair Labour Practice - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on

hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union *animus* and claiming that discharge motivated by employee having lied to management about theft committed by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and declarations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

LOEB HIGHLAND, 810048 ONTARIO LIMITED C.O.B. AS; RE UFCW, LOCAL 175/633.....	197
Practice and Procedure - Discharge - Discharge for Union Activity - Evidence - Unfair Labour Practice - Employer claiming that employee discharged for having lied to management about theft committed by another employee - Union objecting to introduction of evidence about “similar incident” involving other employee on ground that it pertained to material fact which had not been set out in employer’s response - Board relying on Rule 20 of Board’s Rules of Procedure to uphold objection - Discharge tainted by anti-union <i>animus</i> - Board finding that employer violated the Act when it met with employee to discuss his organizing activities and when the employee was discharged - Reinstatement with compensation ordered	
LOEB IGA HIGHLAND, 810048 ONTARIO LTD. C.O.B. AS; RE UFCW, LOCAL 175/633.....	208
Practice and Procedure - Evidence - Unfair Labour Practice - Board not permitting counsel to pursue line of questioning where application did not particularize any of the facts on which the union was seeking to cross-examine	
MORRISON’S MEAT PACKERS LTD.; RE UAW	226
Practice and Procedure - Interference in Trade Unions - Interim Relief - Remedies - Unfair Labour Practice - Union alleging that employer interfering with organizing drive by posting and distributing certain letter to employees - Board considering whether complaint making out arguable case and also assessing relative harm of granting or withholding relief - Board aiming to preserve union’s right to meaningful remedy, should complaint be upheld, while intruding as little as possible on employer’s interests - Employer directed to remove letter from any area in which it was posted and to refrain from communication with employees involving counselling workers to resign union membership - Board’s order effective until disposition or settlement of complaint	
REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA)	242
Practice and Procedure - Jurisdictional Dispute - Parties disputing assignment of work in connection with removal for scrap of exterior metal siding - Board declaring that work in dispute should be assigned to Sheet Metal Workers’ union - Board observing that “kitchen sink” approach to preparation of briefs in jurisdictional dispute complaints not particularly helpful - Board noting that parties in this case could properly have focused on the practice relating specifically to the work in dispute and the application of the employer’s policy with respect to the assignment of such work	
ONTARIO HYDRO, EPSCA, LIUNA, LOCAL 1059; RE ONTARIO SHEET METAL WORKERS’ & ROOFERS’ CONFERENCE, SMW, LOCAL 473.....	227

Remedies - Bargaining Rights - Construction Industry - Interim Relief - Practice and Procedure - Unfair Labour Practice - Bricklayers' union Local 2 alleging that Builders Association, Labourers' union and others committing unfair labour practice by, *inter alia*, agreeing to sub-contracting clause in collective agreement between them requiring bricklaying work to be performed by companies bound to agreement with Labourers' union or Bricklayers' union Local 1 - Local 2 requesting that operation of sub-contacting clause be stayed pending resolution of unfair labour practice complaint - Board commenting on lack of particularity and absence of supporting facts establishing first-hand knowledge in declaration filed by Local 2 - Board also noting that interim relief applications may be decided without oral hearings and that parties who fail to provide complete written representations, as required by Rule 86, do so at their peril - Only very discrete core of Local 2's complaint supporting arguable case - Board considering delay in starting proceedings - No obvious reason why harm to Local 2 of denying application outweighing harm to responding parties of staying sub-contracting provision - Application for interim order dismissed

METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION AND LIUNA, LOCAL 183; RE BAC, LOCAL 2; RE METROPOLITAN INDUSTRIAL & COMMERCIAL MASONRY CONTRACTORS INC.; RE MASONRY CONTRACTORS ASSOCIATION OF TORONTO INC.....

219

Remedies - Bargaining Rights - Sale of a Business - Unfair Labour Practice - Board, in earlier decision, declaring that sale of a business occurred but that bargaining rights terminated and that collective agreement no longer binding - Parties disputing effective date of declaration - Board considering it appropriate to make declaration effective as of date of "sale", as if transaction never occurred, and so directing - Board also ruling on parameters of available relief in connection with earlier finding that employer had violated section 67 of the *Act* - Alternate Chair appointed to meet with parties and assist them in resolving outstanding issues

KITCHENER WATERLOO HOSPITAL; RE ONA; RE GROUP OF EMPLOYEES

187

Remedies - Construction Industry - Construction Industry Grievance - Damages - Judicial Review - Employer grieving against union and employee alleging improper claim and receipt of room and board allowance by employee - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing - Employer seeking judicial review - Divisional Court ruling that Board declined its jurisdiction to consider award of damages against the employee and remitting matter to the Board for its determination

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, HFIA, LOCAL 95, JAMES CORD, AND THE OLRB

276

Remedies - Discharge - Discharge for Union Activity - Evidence - Interim Relief - Practice and Procedure - Unfair Labour Practice - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union *animus* and claiming that discharge motivated by employee having lied to management about theft committed by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and declarations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm

from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

LOEB HIGHLAND, 810048 ONTARIO LIMITED C.O.B. AS; RE UFCW, LOCAL 175/633.....

197

Remedies - Interference in Trade Unions - Interim Relief - Practice and Procedure - Unfair Labour Practice - Union alleging that employer interfering with organizing drive by posting and distributing certain letter to employees - Board considering whether complaint making out arguable case and also assessing relative harm of granting or withholding relief - Board aiming to preserve union's right to meaningful remedy, should complaint be upheld, while intruding as little as possible on employer's interests - Employer directed to remove letter from any area in which it was posted and to refrain from communication with employees involving counselling workers to resign union membership - Board's order effective until disposition or settlement of complaint

REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA)

242

Remedies - Discharge - Discharge for Union Activity - Interim Relief - Unfair Labour Practice - Board directing employer to reinstate employees on an interim basis pending disposition of their unfair labour practice discharge complaint - Employer also directed to post Board notice in workplace and to provide copies of notice to employees affected by union's certification application

TATE ANDALE CANADA INC.; RE USWA.....

254

Representation Vote - Certification - Charter of Rights and Freedoms - Constitutional Law - Natural Justice - Petition - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the *Act* and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3) of the *Act* to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing

HEMLO GOLD MINES INC.; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES

158

Sale of a Business - Bargaining Rights - All events material to application occurring prior to coming into force on January 1, 1993 of amendments to *Labour Relations Act*, including amendments to section 64 - Board hearing held after January 1, 1993 - Board applying section 64, as it existed prior to amendments, to facts of the case - Responding employer owning and operating retail food store previously owned and operated as retail food store by A & P - Store directly sub-let by A & P to responding employer - Even if result could be said to be expansion of responding employer's existing business, result accomplished through acquisition of part of A & P's business - Transaction constituting sale of business within meaning of the *Act* - Declaration issuing

PENNY LANE FOOD MARKETS LTD.; RE UFCWU, LOCAL 175/633; RE GROUP OF EMPLOYEES.....

230

Sale of a Business - Bargaining Rights - Remedies - Unfair Labour Practice - Board, in earlier decision, declaring that sale of a business occurred but that bargaining rights terminated

and that collective agreement no longer binding - Parties disputing effective date of declaration - Board considering it appropriate to make declaration effective as of date of "sale", as if transaction never occurred, and so directing - Board also ruling on parameters of available relief in connection with earlier finding that employer had violated section 67 of the *Act* - Alternate Chair appointed to meet with parties and assist them in resolving outstanding issues

KITCHENER WATERLOO HOSPITAL; RE ONA; RE GROUP OF EMPLOYEES 187

Unfair Labour Practice - Adjournment - Practice and Procedure - Parties agreeing to *sine die* adjournment of unfair labour practice complaint in which union had requested expedited hearing under section 92.2 of the *Act* - Board taking union's adjournment request to be withdrawal of request for expedited hearing - Board granting *sine die* adjournment, but for period not to exceed three months

COOPER INDUSTRIES (CANADA) INC. C.O.B. AS WAGNER DIVISION OF COOPER INDUSTRIES (CANADA) INC.; RE UNITED STEELWORKERS OF AMERICA 157

Unfair Labour Practice - Bargaining Rights - Construction Industry - Interim Relief - Practice and Procedure - Remedies - Bricklayers' union Local 2 alleging that Builders Association, Labourers' union and others committing unfair labour practice by, *inter alia*, agreeing to sub-contracting clause in collective agreement between them requiring bricklaying work to be performed by companies bound to agreement with Labourers' union or Bricklayers' union Local 1 - Local 2 requesting that operation of sub-contacting clause be stayed pending resolution of unfair labour practice complaint - Board commenting on lack of particularity and absence of supporting facts establishing first-hand knowledge in declaration filed by Local 2 - Board also noting that interim relief applications may be decided without oral hearings and that parties who fail to provide complete written representations, as required by Rule 86, do so at their peril - Only very discrete core of Local 2's complaint supporting arguable case - Board considering delay in starting proceedings - No obvious reason why harm to Local 2 of denying application outweighing harm to responding parties of staying sub-contracting provision - Application for interim order dismissed

METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION AND LIUNA, LOCAL 183; RE BAC, LOCAL 2; RE METROPOLITAN INDUSTRIAL & COMMERCIAL MASONRY CONTRACTORS INC.; RE MASONRY CONTRACTORS ASSOCIATION OF TORONTO INC. 219

Unfair Labour Practice - Bargaining Rights - Remedies - Sale of a Business - Board, in earlier decision, declaring that sale of a business occurred but that bargaining rights terminated and that collective agreement no longer binding - Parties disputing effective date of declaration - Board considering it appropriate to make declaration effective as of date of "sale", as if transaction never occurred, and so directing - Board also ruling on parameters of available relief in connection with earlier finding that employer had violated section 67 of the *Act* - Alternate Chair appointed to meet with parties and assist them in resolving outstanding issues

KITCHENER WATERLOO HOSPITAL; RE ONA; RE GROUP OF EMPLOYEES 187

Unfair Labour Practice - Discharge - Discharge for Union Activity - Evidence - Interim Relief - Practice and Procedure - Remedies - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union *animus* and claiming that discharge motivated by employee having lied to management about theft committed by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and dec-

larations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

LOEB HIGHLAND, 810048 ONTARIO LIMITED C.O.B. AS; RE UFCW, LOCAL 175/633.....

197

Unfair Labour Practice - Discharge - Discharge for Union Activity - Evidence - Practice and Procedure - Employer claiming that employee discharged for having lied to management about theft committed by another employee - Union objecting to introduction of evidence about "similar incident" involving other employee on ground that it pertained to material fact which had not been set out in employer's response - Board relying on Rule 20 of Board's Rules of Procedure to uphold objection - Discharge tainted by anti-union *animus* - Board finding that employer violated the Act when it met with employee to discuss his organizing activities and when the employee was discharged - Reinstatement with compensation ordered

LOEB IGA HIGHLAND, 810048 ONTARIO LTD. C.O.B. AS; RE UFCW, LOCAL 175/633.....

208

Unfair Labour Practice - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Board directing employer to reinstate employees on an interim basis pending disposition of their unfair labour practice discharge complaint - Employer also directed to post Board notice in workplace and to provide copies of notice to employees affected by union's certification application

TATE ANDALE CANADA INC.; RE USWA.....

254

Unfair Labour Practice - Evidence - Practice and Procedure - Board not permitting counsel to pursue line of questioning where application did not particularize any of the facts on which the union was seeking to cross-examine

MORRISON'S MEAT PACKERS LTD.; RE UAW.....

226

Unfair Labour Practice - Interference in Trade Unions - Interim Relief - Practice and Procedure - Remedies - Union alleging that employer interfering with organizing drive by posting and distributing certain letter to employees - Board considering whether complaint making out arguable case and also assessing relative harm of granting or withholding relief - Board aiming to preserve union's right to meaningful remedy, should complaint be upheld, while intruding as little as possible on employer's interests - Employer directed to remove letter from any area in which it was posted and to refrain from communication with employees involving counselling workers to resign union membership - Board's order effective until disposition or settlement of complaint

REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA).....

242

Witness - Adjournment - Evidence - Jurisdictional Dispute - Practice and Procedure - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers union to call witness who had already once testified - Other than in reply, a party should not be per-

mitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists

VIC WEST STEEL, CJA, LOCAL 1256; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE AND SMW, LOCAL 539; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP

3185-92-U United Steelworkers of America, Applicant v. Cooper Industries (Canada) Inc. c.o.b. as Wagner Division of Cooper Industries (Canada) Inc., Responding Party

Adjournment - Practice and Procedure - Unfair Labour Practice - Parties agreeing to *sine die* adjournment of unfair labour practice complaint in which union had requested expedited hearing under section 92.2 of the Act - Board taking union's adjournment request to be withdrawal of request for expedited hearing - Board granting *sine die* adjournment, but for period not to exceed three months

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

DECISION OF THE BOARD; March 4, 1993

1. This is an application under section 91 of the *Labour Relations Act* in which the applicant requested an expedited hearing under section 92.2 of the Act. Section 92.2 provides that:

92.2-(1) This section applies to a complaint under section 91 alleging that, during the period beginning with a trade union's organizing activities and ending with the disposition of its application for certification, an employee has been disciplined, has had his or her employment terminated, has received notice of discipline or termination of employment or has been otherwise penalized contrary to this Act.

(2) If the trade union requests an expedited hearing of the complaint, the Board shall begin its inquiry into the complaint within fifteen days after the later of,

- (a) the day on which the request is filed with the Board; and
- (b) the day on which the request is delivered to the respondent named in the complaint.

(3) The Board shall hear the complaint on consecutive days from Mondays to Thursdays, except holidays, until the hearing is completed.

(4) The Board shall render its decision on the complaint within two days after the hearing is completed, excluding Saturdays, Sundays and holidays. The Board may give its decision orally or in writing.

(5) The Board shall give written reasons for the decision within a reasonable period of time upon the request of either party.

(6) The Board may hear and determine any other application or complaint under this Act together with a complaint to which this section applies.

2. The application was filed on February 4, 1993. The Board scheduled a hearing to begin on February 18, 1993. By letters dated February 16, 1993, the applicant and responding employer both advised the Board that they were engaged in what appeared to be productive settlement discussions, and jointly requested that the scheduled hearing be adjourned *sine die* to permit them to pursue those settlement discussions.

3. In the Board's experience, labour relations matters are best resolved by the parties themselves. Consequently, the Board is generally content to permit parties to pursue genuine settlement efforts. On the other hand, there is much truth to the maxim that "labour relations delayed are labour relations defeated and denied" and labour relations matters therefor require

prompt attention. Some of the amendments to the *Labour Relations Act* which came into force on January 1, 1993 emphasize this need for expedition.

4. Nevertheless, speed is not the only objective. On the contrary, the prime objective is the resolution of the dispute, on agreement of the parties if possible, through adjudication if necessary. Consequently, parties should still be allowed, and indeed encouraged, to settle matters between themselves, though perhaps without the luxury of the same kind of time they have enjoyed in the past.

5. We take the applicant trade union's request for an adjournment to be an implicit, if not explicit, withdrawal of its request for an expedited hearing. Accordingly, this application is adjourned *sine die* as requested. In the circumstances, however, the period of the adjournment is not to exceed three months from the date hereof.

6. The parties are directed to forthwith advise the Board if they do settle the dispute in this application, and to any event report to the Board in that respect prior to the expiry of the three month adjournment period herein. If within that three month period the Board receives no such written report, or a request for a hearing, and the matter is not otherwise disposed of by the Board, the application will be dismissed.

3051-92-R United Steelworkers of America, Applicant v. Hemlo Gold Mines Inc., Responding Party v. Group of Employees, Intervenors

Certification - Charter of Rights and Freedoms - Constitutional Law - Natural Justice - Petition - Representation Vote - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the Act and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3) of the Act to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing

BEFORE: Robert D. Howe, Vice-Chair, and Board Members W. A. Correll and C. McDonald.

APPEARANCES: Marie Kelly, Wes Dowsett and Jerry Doucette for the applicant; William G. Shanks and John A. Keyes for the responding party; Janice Gillespie, LaRoy Mackenzie, Wayne Mackenzie and David Odorizzi for the intervenors.

DECISION OF THE BOARD; March 30, 1993

1. This is an application for certification.
2. Seven copies of the application (as required by Rule 7 of the Board's Rules of Proce-

dures) were delivered to and received by the Board on January 25, 1993, which thus became the application filing date by virtue of Rule 8, which provides:

The date of filing is the date a document is received by the Board or, if it is mailed by registered mail addressed to the Board at its office at Toronto, the date on which it is mailed, as verified in writing by the Post Office. However, the date of filing in cases brought under sections 11.1, 41, 73.1, 73.2, 92.1, 92.2, 93, 94, 95, 126 and 137 of the Act is the date the document is received by the Board.

Those seven copies were accompanied by 133 applications for membership (also referred to in this decision as the "Union cards", for ease of reference), a list of employees (in alphabetical order) corresponding with the Union cards, and a (Form A-4) Declaration Verifying Membership Evidence. Thus, the applicant (also referred to in this decision as the "Union") complied with the requirements of Rule 43, which provides:

An applicant for certification as bargaining agent must also file not later than the application filing date:

- (a) any membership evidence relating to the application;
- (b) a list of employees, in alphabetical order, corresponding with the membership evidence filed;
- (c) a declaration verifying the membership evidence filed in the form set by the Board.

3. On January 26 the Board's Registrar sent notice of the application (on Form B-5) to the responding party (also referred to in this decision as the "Company"), together with (Form B-4) Notices to Employees of Application for Certification and of Hearing, for immediate posting where they were most likely to come to the attention of all employees who might be affected by the application. The Form B-4 notices are printed on green paper and, accordingly, are often referred to as the "green sheets". Those materials were sent to the Company at the address provided by the Union (in paragraph 1(c) of its application): 4 King Street West, Suite 900, Toronto, Ontario, M5C 2Z9. Although that address was incorrect, the materials were received by the Company on Thursday January 28 in the late afternoon at its Head Office located at 1 Adelaide Street East, Toronto.

4. The Company's employees for whom the Union seeks bargaining rights work at the Company's mining claim site (the "site") which is located approximately 36.5 kilometers east of the town of Marathon. In order to have the Form B-4 notice posted at the site as quickly as possible, a copy was faxed from the Company's Head Office to the site and the facsimile (on white paper) was posted at the site around noon on Friday January 29. The Company also arranged for the original "green sheets" to be couriered to the site and posted on Monday February 1.

5. The Form B-4 notices that were posted in the manner described above read as follows:

File No. 3051-92-R

Form B-4

LABOUR RELATIONS ACT

NOTICE TO EMPLOYEES OF APPLICATION FOR CERTIFICATION

AND OF HEARING

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

United Steelworkers of America,

Applicant,

- and -

Hemlo Gold Mines Inc.,

Responding Party.

TO THE EMPLOYEES OF:

Hemlo Gold Mines Inc.

1. The applicant, applied on *JANUARY 25, 1993* to the Ontario Labour Relations Board for certification as bargaining agent of employees of Hemlo Gold Mines Inc. in the following unit:

“All employees of the Responding Party at Hemlo (Highway 17, approximately 36.5 kilometres east of the Town of Marathon), save and except Supervisors, persons above the rank of supervisor, office,* clerical,* technical, sales and security staff and students employed during the school vacation period.”

*For Clarity, office and clerical staff includes employees employed in the warehouse.

Note: The Board may decide that the appropriate bargaining unit is different from the one proposed by the applicant.

2. The **terminal date** set for this application is *FEBRUARY 2, 1993*.
3. If you wish to participate in these proceedings, you must notify the Registrar in writing by the terminal date, and include your name, address and telephone number and the Board file number.
4. If you filed evidence of objection or re-affirmation relevant to this application by the application date, you must appear at the hearing in person or by a representative and present evidence that includes testimony from your or their personal knowledge as to the circumstances of the written evidence, including how it was created and the way in which each signature on the document was obtained. The Board may decide an application without considering the evidence of objection or evidence of re-affirmation of any employee who does not appear as required. The Board will not consider oral membership evidence, or oral evidence of objection or re-affirmation, except to iden-

tify written evidence filed by the application date in the manner required by the Rules and the *Labour Relations Act*.

5. Other relevant statements, if any:

n/a

6. **A meeting with a Labour Relations Officer will take place** at the Icelandic Room, Valhalla Inn, 1 Valhalla Inn Road, Thunder Bay, Ontario, on *WEDNESDAY, FEBRUARY 17, 1993*, at *09:30 A. M.* for the purpose of trying to settle all or part of this case if the case is not already settled by that date.
7. **The hearing of the application will take place** at the "Board Room", 6th Floor, 400 University Avenue, Toronto, Ontario, *ON MONDAY, FEBRUARY 22, 1993, AT 9:30 A.M.* if the case is not already settled by that date, and it will continue on consecutive days from Monday to Thursday, excluding Fridays and holidays until completed or as the Board otherwise directs.

THE PURPOSE OF THE HEARING is to hear the evidence and representations of the parties with respect to all matters relating to the application referred to in paragraph (1).

DATED January 26, 1993.

T. A. Inniss

Registrar
Ontario Labour Relations Board

NOTE: All communications should be addressed to:

The Registrar
Ontario Labour Relations Board
4th Floor
400 University Avenue
Toronto, Ontario
M7A 1V4
(416) 326-7500

IMPORTANT NOTE

IF YOU DO NOT FILE YOUR RESPONSE AND OTHER REQUIRED DOCUMENTATION IN THE WAY REQUIRED BY THE RULES, THE BOARD MAY NOT PROCESS YOUR RESPONSE AND DOCUMENTS, AND MAY DECIDE THE APPLICATION WITHOUT FURTHER NOTICE TO YOU. FURTHERMORE, YOU MAY BE DEEMED TO HAVE ACCEPTED ALL THE FACTS STATED IN THE APPLICATION.

THE BOARD'S RULES OF PROCEDURE DESCRIBE HOW A RESPONSE (WHICH INCLUDES AN INTERVENTION) MUST BE FILED WITH THE BOARD, WHAT INFORMATION MUST BE PROVIDED AND THE TIME LIMITS THAT APPLY.

PLEASE CONSULT THE BOARD'S RULES OF PROCEDURE BEFORE COMPLETING YOUR RESPONSE. COPIES OF THE BOARD'S RULES MAY BE OBTAINED FROM THE BOARD'S OFFICE LOCATED ON THE 4TH FLOOR AT 400 UNIVERSITY AVENUE, TORONTO, ONTARIO (TEL. (416) 326-7500).

IF YOU DO NOT ATTEND THE LABOUR RELATIONS OFFICER MEETING OR THE HEARING, THE BOARD MAY DECIDE THE APPLICATION WITHOUT FURTHER NOTICE TO YOU AND WITHOUT CONSIDERING ANY DOCUMENT YOU MAY HAVE FILED.

YOU HAVE THE RIGHT TO COMMUNICATE WITH AND RECEIVE AVAILABLE SERVICES FROM THE BOARD IN EITHER ENGLISH OR FRENCH.

PLEASE INDICATE WHETHER YOU WILL REQUIRE ANY SPECIFIC SERVICES, INCLUDING TRANSLATION SERVICES FOR WITNESSES, OR SERVICES FOR PERSONS WHO ARE HEARING OR VISION IMPAIRED OR OTHER SERVICES. THE BOARD WILL ATTEMPT TO ACCOMMODATE YOU, BUT MAY NOT BE ABLE TO MEET YOUR SPECIFIC REQUESTS(S).

6. A number of the employees found that notice difficult to understand. Some of them attempted to gain more information by calling the Board. Instrument Technician LaRoy MacKenzie telephoned the Board on two occasions but encountered a busy signal each time he called. Another employee succeeded in reaching the Board but, after being switched to four different people, was told that the Board could not provide him with any legal advice concerning the application.

7. On the evening of January 29, a group of employees met at the home of one of the Company's miners and discussed signing a petition in opposition to the Union, with the intention of forwarding it to the Board. Petitions addressed to the Board's Registrar were drafted, and nine employees proceeded to sign up a total of 119 employees that evening and during the next three days. All but nine of those signatures are on petitions which read: "We the undersigned employees of Hemlo Gold Mines Inc., would like to file an official evidence of objection against the application for certification of the United Steelworkers of America. File No. 3051-92-R." The other nine signatures are on petitions which have the following heading (below the name, address, and telephone number of the Board):

We the undersigned employees of Hemlo Gold Mines Inc. are giving written notification that we want our union cards revoked, we have tried on several occasions to get through at the above listed number to no avail. Please accept this as our notification that we do not support the United Steelworkers Of America in their attempt to unionize Hemlo Gold Mines Inc.

A committee was also formed and given the name "Employees of Hemlo Gold Mines for a Democratic Choice". Mr. MacKenzie was elected Chairman of the Committee and was instructed to contact a labour lawyer. On the morning of Monday February 1, after attempting without success to telephone several labour lawyers in Thunder Bay, he reached one who, after making some initial inquiries, advised Mr. MacKenzie that he had a conflict of interest as he had previously represented the Union. That lawyer gave Mr. MacKenzie the name of another lawyer, Peter T. Hollinger. Mr. MacKenzie succeeded in contacting Mr. Hollinger later that day and made an appointment to see him on the following day. Mr. MacKenzie travelled over 300 kilometres to reach Mr. Hollinger's office. As a result of the instructions which Mr. MacKenzie gave him, Mr. Hollinger filed an Intervention (on Form A-3) on behalf of Mr. MacKenzie and the other members of the aforementioned group of employees. That intervention was filed with the Board (by registered mail) on February 2, along with the aforementioned petitions, a notice of motion, and a supporting affidavit sworn by Mr. MacKenzie. The notice of motion requests the following orders:

1. [An order that the] Board extend the Application Filing Date to February 2, 1993 to allow the Employees to file the Statements of Desire prior to the Application date pursuant to Rule 27 of the Rules of Procedure of the Ontario Labour Relations Board, January, 1993.
2. An Order that the "Application Filing Date" be deemed to be the "Terminal Date" in the present application pursuant to Rule 43 of the Rules of Procedure.
3. An Order permitting the Intervenor Group of Employees to intervene in the Application for Certification pursuant to Rule 26 of the Rules of Procedure.

4. An Order directing the hearing of this application to be heard in the City of Thunder Bay at a time and place to be set by the Board.

8. Also filed by registered mail on February 2 was the Company's (Form A-2) response to the application. In that response the Company (through its counsel, William G. Shanks) requested the Board to dismiss the application on the following grounds, as set forth in paragraph 11 of the response:

- 11(a) This responding party denies the applicant has presented its application properly before the Board in that;
 - (i) it lacks the necessary employee support in the appropriate bargaining unit;
 - (ii) it has not filed proper and sufficient membership evidence relating to the application;
 - (iii) it has failed to comply with the Rules in setting out the section under which the application has been made;
 - (iv) the applicant is not a trade union the Board should recognize;
 - (v) the applicant failed to notify the necessary parties to this application in a timely fashion and in failing to do so is attempting to deny the employees of the responding party of their rights to be heard;
 - (vi) the applicant failed to comply with its own constitution, charter or practices, in failing to obtain consideration when soliciting members, and that such constitution is contrary to Ontario and Federal Law; and
 - (vii) failed to file evidence of membership prior to this application being commenced such that there is no membership evidence in support of this application.
- 11(b) This proceeding was commenced in 1992, prior to Bill 40 coming into force January 1, 1993 and accordingly, since the substantive law was changed this application should properly be determined using the law at the time of commencement of the application.
- 11(c) This responding party requires further details of the application, evidence and support of the application, and documents before any greater particularity can be stated relative to its objection to the application and the facts on which it will rely at the hearing.

9. In a letter faxed to the Board on February 10, Mr. Hollinger reiterated his request that the hearing be held in Thunder Bay, advised the Board that an associate, Janet Gillespie, would be attending the hearings on his behalf due to his unavailability, and requested that a Court Reporter be present at the Board hearing so that a transcript of the proceedings could be made available. Mr. Hollinger's office was subsequently advised by the Board's Deputy Registrar that the hearing would be held in Toronto, that the Board does not provide Court Reporters or transcripts, and that he could bring anyone he wanted to the hearing to take notes.

10. The considerations which form the basis of the Board's practice of not using verbatim reporters or otherwise producing transcripts of its proceedings are set forth in *John Kohut*, [1990] OLRB Rep. Oct. 1042, at paragraphs 14 to 21, and need not be repeated in this decision. All that need be noted here is that the verbatim reporter who was in attendance at the hearing of this application on February 22, 23, and 24, 1993, was present through private arrangements between the reporter and intervenors' counsel, and was not transcribing the proceedings on behalf of the

Board. Thus, any transcript prepared by the reporter does not constitute an official record of the proceedings.

11. As regards the request that the hearing be held in Thunder Bay, it should be noted that the location in which a Board hearing is to be held is an administrative matter for determination by the Registrar, in consultation with the Chair of the Board. In order to expedite the hearing of certification applications and certain other highly time-sensitive matters, the Board has administratively extended the fast-track hearing system (which is mandatory for certain section 91 complaints by virtue of section 92.2 of the *Labour Relations Act*) to include certification cases and those other time-sensitive matters. Thus, certification cases (including the instant case) are scheduled to be heard on consecutive days, excluding Fridays, Saturdays, Sundays, and holidays, until the hearing is completed, or as otherwise directed by the Board (which, under Rule 34, may adjourn a case on such terms as it considers advisable if it considers that the adjournment is consistent with the purposes of the Act). Funding and personnel limitations render it impossible for the Board to schedule fast-track cases outside of Toronto, as the system involves having on standby for fast-track and other expedited cases a rotating pool of Vice-Chairs and Board Members who, as cases settle or finish being heard, are frequently re-assigned to other urgent matters, often on a rush basis which would not be possible if a fast-track panel were in a location away from Toronto such as Thunder Bay. (Within the limits of its resources, the Board accommodates the legitimate interests of parties in minimizing the time and cost of their involvement in certification proceedings by scheduling and holding Labour Relations Officer's settlement meetings (such as the one held in Thunder Bay on February 17, 1993, in respect of this application) in regional centres such as Windsor, Ottawa, and Thunder Bay.)

12. On or about February 16, Ms. Gillespie caused the following Notice of Constitutional Question to be served on the Attorney General of Ontario and the Attorney General of Canada (with copies to the Board, the Union, the Company, and Company counsel):

File No. 3051-92-R

LABOUR RELATIONS ACT

INTERVENTION

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

B E T W E E N :

UNITED STEELWORKERS OF AMERICA

Applicant,

- and -

HEMLO GOLD MINES INC.

Responding Party,

NOTICE OF CONSTITUTIONAL QUESTION

THE INTERVENOR, LaRoy MacKenzie, on behalf of a Group of Employees of the Responding Party, intends to question the constitutional validity of Section 8(4) of the Ontario Labour Relations Act, S.O. 1992, C. 21 and Rule 47 of the Rules of Procedure, January, 1993, in a motion to be heard on Monday, the 22nd day of February, 1993 at 9:30 a.m. at the "Board Room", 6th Floor, 400 University Avenue, Toronto, Ontario.

THE FOLLOWING are the material facts giving rise to the constitutional question:

1. On or about the 29th day of January, 1993, the employees at the Hemlo Golds Mines Inc. work place heard by word of mouth that a notice had been posted at the work place indicating that the United Steelworkers of America had applied to certify the work place. The notice indicated that the Terminal Date was February 2, 1993 and indicated that Employees could file Statements of Desire with the Board. The Employees believed that they had until the Terminal Date to file Statements of Desire.

2. Upon the notice being posted at the work place, various Employees began to discuss it throughout Friday afternoon. Very few people understood the notice or understood what it meant or what the implications of it were. Employees became very upset over the uncertainty and several individuals attempted to telephone the Ontario Labour Relations Board telephone number indicated on the notice. LaRoy MacKenzie telephoned twice and kept getting a busy signal. Another individual, Toby Wilcot, phoned several times and was eventually successful in getting through. Toby Wilcot was switched to four different employees of the Ontario Labour Relations Board before anyone was willing to explain anything to him. When he finally talked to an individual he was advised that there was an application by the Steelworkers and that the Board member could not offer him any legal advice and advised him to retain a lawyer. Toby Wilcot reported this to the other Employees.

3. On Friday evening of January 29, 1993, Katherin Knot, a miner held a meeting with a group of employees at her home and they discussed signing a Petition indicating their opposition to the union with the intention of forwarding it to the Ontario Labour Relations Board. Petitions were drafted and nine (9) Employees proceeded to sign up a total of 119 Employees on January 29, 30, 31 and February 1, 1993. A committee was formed and the following name was chosen "Employees of Hemlo Gold Mines for a Democratic Choice". Chairman and Secretary-Treasurer were elected. Immediately on Monday morning the Chairman commenced telephoning labour lawyers in the City of Thunder Bay. After telephoning several lawyers and being unable to reach any of these lawyers, the Chairman was finally successful in contacting Bob Edwards who upon making initial inquiries advised the Chairman, LaRoy MacKenzie that he had a conflict of interest in that he had previously represented the Applicant. Mr. Edwards gave the Chairman the name of Peter T. Hollinger. Eventually, the Chairman was successful in contacting Mr. Hollinger on the afternoon of February 1, 1993 and an appointment was scheduled to see Mr. Hollinger on February 2, 1993.

4. A representative of the Employees had to travel over 300 kilometres to get to the lawyer's office. Given the late posting of the notice and the substantial geographic distance involved it is the position of the Employees that the notice was ineffective since it was insufficient. The notice to the Employees states that the Employees may file evidence of objection to the Application with the Board. The Employees were not informed of their right to object to the Application until after it was too late to object. Accordingly, the notice has no meaning or effect whatsoever.

THE FOLLOWING are the grounds for the constitutional question:

1. There is no definition of "Certification Application Date" in the Ontario Labour Relations Act.

2. Rule 29 of the Rules of Procedure, January, 1993, state:

"29. Where a hearing will be held in a case, written notice of the hearing will be given to all parties setting out the time, date and place of hearing."

3. Section 8 of the Ontario Labour Relations Act recognizes the right of Employees in the work place to file a Statement of Desire indicating their opposition to an Applicant trade union.

4. It is the practise and procedure of the Board to include in the Notice of Hearing a written notification to the Employees in the work place that they have a right to file a Statement of Desire indicating their opposition to an applicant trade union.

5. The Board has the discretion to pick the application Date and chose January 25, 1993 in the present Application.
6. The Board has the discretion to choose when to give notice of the Application to the Employees.
7. The Board chose to give notice to the Employees of both the hearing and their right to file a Statement of Desire indicating opposition to the union after the Application Date.
8. Pursuant to Section 8(4) of the Ontario Labour Relations Act, the Board cannot consider any Statements of Desire filed after the Application Date.
9. By giving notice to the Employees of their right to file a Statement of Desire after the Application Date, the Board has effectively eliminated the Employees right to file a Statement of Desire since the Employees' Statement of Desire cannot be considered by the Board.
10. The Board has effectively eliminated the right of the Employees at Hemlo Gold Mines Inc. to file a Statement of Desire by setting the Certification Application Date as the same date as the Application Filing Date referred to in Rule 43 of the Rules of Procedure.
11. By manipulating procedural rules the Board has denied the Employees at Hemlo Gold Mines Inc. a substantive right to participate in the certification process.
12. Certification of the Applicant affects the substantive legal rights of the Employee. *Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.) v. Globe Printing Co.*, [1953] 2 S.C.R. 18).
13. Failure to give Employees notice of the right to object or intervene in a timely fashion constitutes a denial of the Employees' right to fundamental justice. It contravenes those rights by denying the Employee an opportunity to participate fully and become a party in the certification process.
14. Failure to notify the Employee of a material and substantial alteration in his working conditions without prior notice is an infringement of the Employees right to life, liberty and security of person pursuant to Section 7 of the Charter of Rights, R.S.C. 1990 and is a denial of fundamental justice.
15. Failure to give Employees notice of their right to intervene or object until after the fact and refusing to accept statements of desire after the application filing date compels them to become a union member without an effective hearing and it is an infringement of the individual Employee's freedom of association under Section 2(d) of the Canadian Charter of Rights and Freedoms, R.S.C. 1990. *Lavigne v. Ontario Public Service Employees Union, et al.* (1991), 4 C.R.R. (2d) 193.
16. Canadian Charter of Rights and Freedoms, R.S.C. 1990;
17. Ontario Labour Relations Act, S. O. 1991;
18. Rules of Procedure, January, 1993;
19. Rules of Civil Procedure; and
20. Courts of Justice Act, R.S.O. 1990, C. 43, as amended.

February 16, 1993. JANICE M. GILLESPIE

13. The Ministry of the Attorney General of Ontario responded to that notice as follows on February 19, 1993, in a letter (on the letterhead of its Constitutional Law & Policy Division) from Robert E. Charney to intervenors' counsel:

Dear Ms. Gillespie:

Re: United Steelworkers of America v. Hemlo Gold Mines

We acknowledge receipt of your Notice of Constitutional Question dated February 16, 1993, indicating your intention to challenge the constitutional validity of s. 8(4) of the Ontario *Labour Relations Act*, S.O. 1992, c. 21 and rule 47 of the Rules of Procedure, in a motion to be heard by the Labour Relations Board on February 22, 1993.

Please be advised that while the Attorney General supports the constitutional validity of the impugned legislative provisions, it is not possible for us to intervene in this proceeding on only six days' notice. Since we do not believe that an adjournment of this proceeding is appropriate, we will not participate in this matter at this stage of the proceedings.

We trust that counsel will bring the case of *Professional Institute of the Public Service of Canada v. Northwest Territories*, [1990] 2 S.C.R. 367 to the attention of the tribunal.

Please advise us of the outcome of this motion.

Yours very truly,

"Robert E. Charney"

Robert E. Charney
Counsel

c.c. Brian Shell, United Steelworkers

14. When representatives of the parties met with Board Officer Fernando Da Silva on February 17 in Thunder Bay (at the meeting referred to in paragraph 6 of the "green sheets"), they reached agreement on some portions of the bargaining unit description (as detailed in paragraph 53 of this decision), and reviewed, finalized, and initialled the list of employees who were in the bargaining unit on January 25, 1993. During that meeting the Board Officer also advised the parties as to the form of the membership evidence filed by the applicant, advised them of the contents of the (Form A-4) Declaration Verifying Membership Evidence filed by the applicant, and provided the Company with an opportunity to examine that declaration. He further advised the parties' representatives that, subject to the Board's usual second check of the membership evidence, the Union appeared to be in an interim certifiable position. The Board Officer's written report of that meeting also indicates that both he and the parties recognized that a hearing would be required to deal with the following outstanding matters:

BARGAINING UNIT DESCRIPTION
ARTICLE 11 OF THE RESPONSE EXCLUDING 11(A)IV
PETITION/INTERVENTION
APPLICANT CHALLENGES THE STATUS OF THE INTERVENOR

The position adopted by the Union at that meeting was confirmed and detailed in a letter dated February 19 to the Registrar from Union counsel.

15. At the commencement of the hearing of this matter on February 22, the Board heard submissions from counsel for each of the parties concerning the last issue listed in the Board Officer's report. After recessing to consider the matter, we made the following unanimous oral ruling:

Having had an opportunity to consider the submissions of counsel, we find it unnecessary to determine whether or not LaRoy MacKenzie has status to intervene in this matter, as we are unanimously of the view that the intervention has been filed on behalf of all of the persons who signed the petitions that were filed with the Board together with the intervention, a number of

whom are included on the list of employees included in the bargaining unit. In this regard, we note that two of those persons, Wayne MacKenzie and David Odorizzi, are present in the hearing room today as advisors to Ms. Gillespie.

In view of that ruling, it was unnecessary for the Board to deal with Ms. Gillespie's motion for an amendment to the intervention to specifically include Allan Tomlinson, Roger Perron, and Wayne MacKenzie as intervenors. It was also unnecessary to deal with her request for a finding that LaRoy MacKenzie, as Chairman of the group of employees known as "Employees of Hemlo Gold Mines for a Democratic Choice", had status to intervene on their behalf.

16. The Board then proceeded to hear the submissions of counsel for each of the parties concerning the issues raised in the intervention and the intervenors' Notice of Constitutional Question. After hearing those submissions, the Board reserved its decision on those matters on February 22 and proceeded to hear other aspects of the case. However, during the course of the continuation of hearing on February 23, the Board made the following oral ruling on those matters:

For the information and guidance of the intervenors and the other parties, we find it appropriate to give you a "bottom line" ruling at this time on the issues raised by the intervenors, concerning which we heard argument from counsel for each of the parties yesterday. For reasons which will issue at a later date, we are unanimously of the view that there is no merit in the Charter issues, the natural justice issues, or any of the other issues raised by the intervenors. It is clear to us that the certification application date referred to in section 8 of the Act is the date on which the application was filed with the Board, i.e., January 25, 1993. Since the petitions filed by the intervenors were not filed until after that date, section 8(4) of the Act precludes the Board from considering them. We have no power to modify or extend that date. We are also unanimously of the view that neither the Board nor the Union was required to provide the employees with any form of notice prior to the application being filed.

17. In providing our reasons for that ruling, we note that during the course of argument counsel referred the Board to a number of Court and Board decisions. Although we have duly considered all of those cases, we have not found many of them to be of assistance in deciding this matter, except to the extent indicated below.

18. The *Labour Relations Act* has recently been extensively amended by S.O. 1992, c. 21 (which for ease of reference will be referred to in this decision as "Bill 40"). Those amendments, which became effective January 1, 1993, include a number of changes to the certification process. Prior to those amendments, the Board was required by section 7(1) of the Act to "ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j)." The latter clause empowered the Board "to determine the form in which and the time as of which evidence of membership in a trade union or objection by employees to certification of a trade union ... shall be presented to the Board on an application for certification" As a matter of practice, the Board invariably determined that time to be the "terminal date", which under the Board's Rules of Procedure that were in force prior to January 1, 1993 (the "old Rules") was fixed by the Registrar pursuant to (old) Rule 2, which read:

When an application is made, the registrar shall fix a terminal date for the application which shall be not less than five and not more than ten days, as directed by the Board, after,

- (a) the day on which the registrar serves the employer with the notice of application for posting, where they are served personally; or
- (b) the day immediately following the day on which the registrar mails the notices of application to the employer for posting, where they are served by mail.

Under the old Rules, the terminal date was also the date by which membership evidence and evidence of objection by employees to certification (generally referred to as “petitions” or “statements of desire”) had to be filed with the Board (see old Rule 73). Under old Rule 75, filing of a document was deemed to be made at the time it was received by the Board or, where it was mailed to the Board by registered mail, at the time it was mailed. Thus, prior to January 1, 1993, the (Form 6) Notice to Employees of Application for Certification and of Hearing notified employees affected by the application that any of them desiring to make representations to the Board in opposition to the application were required to send a statement of desire to the Board in such manner that it was either received by the Board not later than the terminal date, or mailed to the Board by registered mail not later than the terminal date. Prior to the Bill 40 amendments, in determining (for purposes of section 7 of the Act) “the time the application was made”, the Board was guided not only by old Rule 75, but also by section 113(2) of the Act, the material portion of which provided that “[a]n application for certification ..., if sent by registered mail addressed to the Board at Toronto, shall be deemed to have been made on the date on which it was so mailed.”

19. Thus, prior to the Bill 40 amendments, the Act and the (old) Rules required the Board to, in effect, consider a snapshot taken as of the date the application was filed in order to determine the number of employees in the bargaining unit, and to consider a snapshot taken at a later date (which in practice was invariably the terminal date), in ascertaining the number of employees who were members of the union. The first snapshot was the denominator, and the second snapshot was the numerator of the fraction which when converted to a percentage (by multiplying the fraction by 100) constituted what is generally referred to in the labour relations community as the “count”. Under section 7(2) of the pre-1993 Act, the Board was required to direct that a representation vote be taken if the count was not less than forty-five per cent and not more than fifty-five per cent. If the count was more than fifty-five per cent, that subsection gave the Board a discretion to either direct that a representation vote be taken or certify the union without a representation vote.

20. Under the pre-1993 Act, a petition or statement of desire filed by the terminal date did not rescind, cancel, or nullify any of the membership evidence, but if it was found to be voluntary and to cast doubt upon whether the trade union had the unequivocal support of more than fifty-five per cent of the employees in the bargaining unit, it would generally prompt the Board to exercise its discretion to direct that a representation vote be taken. The fact that such petitions could be and generally were circulated after the employer became aware that a certification application had been filed created a substantial opportunity for illicit employer support for the petition or involvement in the petition process. Board hearings held for the purpose of determining the voluntariness of such petitions in the context of union charges of employer involvement and support were often quite protracted and divisive.

21. The Bill 40 amendments changed the certification process in a number of ways which are of significance to the issues raised in these proceedings. The Board is now required (by section 8(1) of the Act) to ascertain upon an application for certification:

- (a) the number of employees in the bargaining unit *on the certification application date*; and
- (b) the number of those employees who are members of the trade union *on that date* or who have applied to become members *on or before that date*.

[Emphasis added]

Thus, instead of notionally considering snapshots taken on two different dates in order to deter-

mine the numerator and denominator of the fraction used to determine the count, the Board is now required to determine both of those numbers as of the “certification application date”. That amendment legislatively mandates the Board to adopt an approach similar to that which has been applied federally by the Canada Labour Relations Board continually since 1974 (with the exception of a brief interruption following a 1977 Federal Court of appeal decision, the effect of which was subsequently reversed in June of 1978 by an amendment to the *Canada Labour Code*): see *Seafarers’ International Union of Canada v. K. D. Marine Ltd.*, 83 CLLC ¶16,069. In commenting on the policy considerations supporting that approach, the Canada Labour Relations Board wrote, in part, as follows in *Canadian Imperial Bank of Commerce, Sioux Lookout*, [1979] 1 Can LRBR 18, at pages 19-20:

[Choosing the date of application as the date for determining employee wishes] renders certification a process that is more administratively efficient, thereby avoiding delays and making access to collective bargaining more meaningful for all employees under federal jurisdiction....

A second purpose was to meet the concerns and adopt the policy expressed in ... earlier Board decisions.... One of the principal concerns was the inviting opportunity for employers to abandon a neutral posture in the employees’ exercise of their freedom and seek to use its special position and relationship to the employees to interfere with their freedom. The use of the application date reduced this opportunity.

In that decision, the Canada Labour Relations Board also made the following observations regarding notice to employees:

The Board still posts notice of application to which employees may reply, but in most cases replies contradicting previous membership evidence, which will postdate the application, will be given no weight unless they allege some impropriety.

That section 8 of the Act similarly does not preclude the Ontario Labour Relations Board from considering such improprieties is clear from section 8(7) which provides:

Subsections (4) and (5) do not prevent the Board from,

- (a) considering whether, on or before the certification application date, section 65, 67 or 71 has been contravened or there has been fraud or misrepresentation;

• • • •

The application date is also the relevant time for assessing employee support for union representation in Saskatchewan, Manitoba, Quebec, and Newfoundland.

22. Section 8(4) of the Act also refers to the “certification application date” in specifying various types of evidence which cannot be considered by the Board unless filed on or before that date. That subsection provides as follows:

The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.

3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

Thus, not only membership evidence, but also petitions and other expressions of desire not to be represented by a trade union (as well as what are sometimes referred to as “counter-petitions”) must be filed with the Board by the “certification application date” if they are to be considered by the Board.

23. It is the position of counsel for the intervenors (and counsel for the responding party) that the Board has a discretion to pick the certification application date, and that it should deem that date to be the “terminal date” of February 2, 1993 for purposes of this application. However, we do not find that position to be tenable. When the certification provisions of the amended Act are read as a whole against the background of the pre-1993 Act, and in conjunction with the new Rules, it is clear to us that a fair, large and liberal reading of them (as required by section 10 of the *Interpretation Act*) leads firmly to the conclusion that the certification application date is the date on which the certification application was filed with the Board. If the Board were to construe that phrase to be a reference to a date subsequent to the date on which the application was filed (such as the terminal date set by the Registrar under Rule 28), an employer could be in a position to gerrymander the denominator of the count fraction by hiring, recalling, discharging, or laying off employees. Moreover, to construe the phrase in that manner would be to effectively negate the effect of the aforementioned amendments on petitions and membership evidence, thereby resurrecting the situation which existed prior to January 1, 1993, and subverting the intent of the Legislature.

24. Although section 113(2) of the Act was repealed by Bill 40, the Board is still required to treat certification applications as having been filed on the date they are received by the Board or, if they are mailed to the Board by registered mail, on the date on which they are mailed, by virtue of Rule 8 (as quoted in paragraph 2 of this decision). Reference may also usefully be made in this context to Rule 43 (as quoted in that same paragraph) and to Rule 47, which provides:

Membership evidence, evidence of objection and evidence of re-affirmation will not be considered by the Board unless the evidence is filed by the application filing date, is in writing, signed by each employee concerned, and is accompanied by the name of the employer and the name, address, telephone number and facsimile number, if any, of a contact person.

Those new rules, which parallel and are consistent with section 8 of the Act, confirm by necessary implication that the “certification application date” referred to in section 8 of the Act is one and the same as the “application filing date” referred to in the Rules, i.e., the date on which the certification application was received by the Board or, if it was mailed to the Board by registered mail, the date on which it was mailed. We find no merit in Ms. Gillespie’s contention that those rules derogate from section 8 of the Act and are, therefore, invalid.

25. Accordingly, for purposes of the instant case, the certification application date (and the application filing date) is January 25, 1993, which is the date on which the application was delivered to and received by the Board. There is no merit in the intervenors’ contention that “by manipulating procedural rules”, the Board has denied employees of the Company a substantive right to participate in the proceedings. Nor is there any merit in their contention that the Board was required by principles of natural justice or fairness to notify employees prior to the certification application date of the right to file a petition or statement of desire on or before that date. Indeed, that would be virtually impossible, as the Board would have no way of knowing of the

application until such time as the Board received it. Thus, although we agree with the intervenors' contention that certification affects substantial legal rights of the employer and the employees, and that they are entitled to notice of the certification proceedings in accordance with the rules of natural justice, we are unanimously of the view that proper notice of these proceedings was given in compliance with the rules of natural justice, as codified for purposes of the *Labour Relations Act* by the provisions of the Act and the Rules. In this regard, we are satisfied that nothing turns on the fact that a faxed copy of the notice to employees was initially posted, pending couriered delivery of the actual "green sheets" provided by the Board. Although some of the employees had difficulty understanding the notice, it was clearly sufficient to prompt them to form the aforementioned committee, retain and instruct counsel, and file through counsel an intervention, notice of constitutional question, and the motions and other materials referred to above. Moreover, both the faxed and the original Form B-4 notices contained all of the information required by the notice requirements of the rules of natural justice, the *Statutory Powers Procedure Act*, the *Labour Relations Act*, and the Rules of Procedure.

26. There is also nothing in the Act which requires a trade union to give employees notice of its intention to file a certification application. Although the intervenors submitted in paragraph 21 of their intervention that the Union had an obligation under section 69 of the Act to give employees in the bargaining unit advance notification of the application date, at the hearing of this matter Ms. Gillespie indicated that the intervenors were no longer advancing section 69 as a basis for that obligation (presumably because it is clear from the wording of that provision that the duty imposed by section 69 only applies to a union "entitled to represent employees in a bargaining unit", i.e., a trade union which has bargaining rights for the employees by virtue of having been certified or voluntarily recognized as their bargaining agent). We were not referred to any provision of the Act or applicable legal principle which would require the applicant to give advance notice to the employees (or to the Board) of its intention to file a certification application. Unions frequently organize through contact with some but not all of the employees of an employer. If it is to obtain certification without a representation vote (in the absence of contraventions of the Act making certification appropriate under section 9.2) a union will have to gain the support of over fifty-five per cent of the employees. However, it is under no obligation to contact all of the employees. A union may be unable to contact employees for whom it does not have an address or telephone number, or who are away on vacation or absent due to illness. Moreover, it may choose to intentionally avoid contacting employees who are known to be strongly opposed to unionization, or who are thought likely to notify the employer of any such contact. Employees who are not contacted by the union are treated by the Act (and the Board) as being opposed to unionization (by virtue of being included in the denominator but not in the numerator of the fraction used to determine the count). The same is true of employees contacted by the union who decline to sign a union card. Whether contacted by a union or not, employees opposed to unionization are free to campaign against unionization at any time (with the possible exception of during working hours if their employer has a prohibition against such activities), just as employees who support unionization are free to express their pro-union views at any time (subject to the same limitation, which is implicitly authorized by section 72 of the Act). Whether the expression of such views will be effective depends not only upon the receptiveness of the listeners, but also upon whether any actions taken by the speakers or listeners are taken within the time frames specified in the Act. For example, an employee in a bargaining unit represented by one union is free to attempt to persuade other employees (during non-working hours) to join another union. However, whether joining the other union will enable it to displace the first union at that time depends upon whether it can avail itself of one of the windows of opportunity provided by the "open periods" specified in section 5 of the Act. The same is true of petitions or statements of desire signed by employees in a bargaining unit who wish to terminate a union's bargaining rights (see section 58 of the Act). Petitions or statements of desire signed by employees who are not represented by a union and who wish to remain

unrepresented may be filed with the Board at any time (and, in accordance with Rule 51, will be kept on file by the Board for six months before being returned to the sender or disposed of if no relevant application for certification is filed within that time). However, section 8(4) precludes the Board from considering them unless they are filed on or before the certification application date which, as noted above, is the date on which the certification application is filed with the Board. If this puts employees at somewhat of a disadvantage in comparison with the union by virtue of the fact that it is the union's action of filing a certification application which determines what the certification application date will be, that disadvantage is inherent in the revised legislation and is not something which the Board is empowered to relieve against.

27. As indicated above, it was also contended on behalf of the intervenors that section 8(4) of the Act and Rule 47 of the Rules of Procedure are constitutionally invalid by virtue of sections 2(d) and 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). In her very brief submissions on the Charter issues, Ms. Gillespie argued that the impugned provisions compel employees to become members of the Union and, therefore, infringe upon their section 2(d) freedom of association. In support of that contention, she cited *Lavigne v. Ontario Public Service Employees Union et al* (1991), 4 C.R.R. (2d) 193 (S.C.C.) as authority for the proposition that freedom of association includes a freedom from compelled association. However, we do not read that case as authority for that proposition. Although three of the seven members of the Supreme Court of Canada who heard the appeal expressed that view (namely La Forest, Sopinka, and Gonthier JJ.), three others (Wilson, L'Heureux-Dubé, and Cory JJ.) took the opposite view, and the remaining member of the Court (McLachlin J.), while suggesting in *obiter dictum* that "[i]n some circumstances, forced association is arguably as dissonant with self-actualization through associational activity as is forced expression", found it unnecessary to conclusively resolve that issue as, in her view, freedom from association, whatever its ambit, could not extend to union dues payments mandatorily deducted from the appellant's wages pursuant to a Rand formula check-off provision in the applicable collective agreement. Moreover, even if it is assumed (without deciding) that freedom of association does include freedom from compelled association, certification does not infringe that freedom, because it does not compel employees to become members of a union. What it does is give the union bargaining rights for all of the employees in the bargaining unit, whether or not they are members of the union. Although section 44(1) of the Act imposes a requirement (except in the construction industry and subject to the Act's section 48 religious exemption provision) that a mandatory union dues check-off provision be included in a collective agreement where a union that is the bargaining agent for employees in a bargaining unit so requests, that provision does not require the employees to become members of the union. A clause requiring membership in a union as a condition of employment will only be included in a collective agreement if the union and the employer agree to its inclusion (or if a board of arbitration is persuaded that such a clause should be included in a collective agreement settled by first agreement (interest) arbitration), and if it is so included, its enforcement will be subject to the significant limitations set forth in section 47(2) of the Act.

28. The broad interpretation of "freedom of association" advocated by intervenors' counsel is also inconsistent with the relatively narrow interpretation which the Supreme Court of Canada has given to that freedom in the context of certification applications, collective bargaining, and other labour relations matters such as the right to strike. See, for example, *Professional Institute of the Public Service of Canada v. N.W.T. (Commissioner)*, [1990] 72 D.L.R. (4th) 1; *Reference Re Public Service Employee Relations Act, Labour Relations Act and Public Officers Collective Bargaining Act* (1987), 38 D.L.R. (4th) 161; *Public Service Alliance of Canada et al. v. The Queen in Right of Canada et al* (1987), 38 D.L.R. (4th) 249; and *Government of Saskatchewan et al. v. Retail, Wholesale & Department Store Union, Locals 544, 496, 635, & 955 et al.* (1987), 38 D.L.R. (4th) 277. The intervenors' case also does not derive any assistance from section 7 of the Charter,

as the “right to life, liberty and security of the person” does not protect economic rights such as the terms and conditions of the individual employment contracts between the Company and its employees. See *Home Orderly Services v. Government of Manitoba* (1987), 43 D.L.R. (4th) 300, leave to appeal refused [1988] 1 S.C.R. ix.

29. At the February 22 hearing, after the Board reserved its decision on the issues canvassed in paragraphs 16 to 28 of this decision, Company counsel requested the Board to direct the Union to produce its Constitution, and to make it available to himself and the Board. He also requested the following information concerning the aforementioned Union cards which the applicant filed with the Board in support of the application:

1. the number of collectors;
2. the range of the dates between which the Union cards were collected, and in particular, whether any of them were collected before January 1, 1993;
3. whether any consideration was given to the collectors at the time the Union cards were collected, and if so, how much; and
4. whether some employees gave consideration and others did not and, if so, the number of employees in each of those two categories.

30. Union counsel opposed those requests, but during the course of her submissions did provide opposing counsel with a blank Union card which, with the exception of the signatures, dates, and other information filled in on the cards filed with the Board, is identical to the cards which the Union filed in support of this application. The front of each of those cards has an insignia in the upper left corner (with two maple leaves and the words “STEELWORKERS DISTRICT 6” outlined by an outer circular band of blue, and five steelworkers depicted in an orange inner circle) and reads as follows:

UNITED STEELWORKERS
Membership — Ontario

YES, I apply for and accept membership in the United Steelworkers of America.

_____ Date: _____19____
SIGNATURE OF APPLICANT

The words “STRICTLY CONFIDENTIAL” are printed diagonally across the “YES, I apply...” sentence on the front of each card. The top portion of the back of each card reads as follows:

I received this card directly from the person whose signature appears on the other side.

_____ Date: _____19____
SIGNATURE OF RECEIVER

The lower portion contains spaces for the applicant employee’s name, home address, postal code, telephone number, employer, and job. It also contains a direction to circle “YES” or “NO” in response to the following question: “DO YOU WORK MORE THAN 24 HOURS PER WEEK?” During the course of argument concerning these issues, Company counsel was also

advised that all of the Union cards were signed after January 1, 1993, and that they were collected by more than one receiver.

31. After recessing to consider the submissions of counsel concerning those matters, the Board made the following unanimous oral ruling:

Assuming without deciding that the Board might, in some circumstances, direct a party to produce a document to another party even if the other party had not taken the usual step of serving a summons *duces tecum* in respect of it, we are not prepared to direct the applicant to produce a copy of its Constitution, as we are not persuaded that it is of any relevance to the matters in issue before us in these proceedings, in view of the provisions of sections 8(1)(b) and 105(4.1) of the Act. For reasons which will issue in writing at a later date, we are satisfied that the cards which have been filed by the applicant in this case meet the requirements of the Act. As regards the other information requested by Company counsel, we note that Union counsel has already provided him with a blank copy of the card, and that he has already been advised that the cards were collected by more than one receiver and that they were all signed in 1993. We are not persuaded that it is either necessary or appropriate to disclose or direct the disclosure of any further information to the Company regarding the cards.

32. We now provide our reasons for that ruling. The requirements concerning what is referred to in the (new) Rules (and in the usual parlance of the labour relations community) as “membership evidence” were also changed by Bill 40. Prior to the Bill 40 amendments, the Act defined “member” as follows:

1 (1) In this Act,

• • •

(l) “member”, when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and “membership” has a corresponding meaning;

• • • •

Also potentially germane to resolving issues concerning union membership was section 105(4) of the Act, which provided:

Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

Both of those provisions were added to the Act in order to codify the Board’s longstanding practice (dating back to at least the early 1950’s) of determining union membership in that fashion. That statutory codification was necessitated by the case of *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796* (1970), 11 D.L.R. (3d) 366, in which the Supreme court of Canada found that the Board had stepped outside of its jurisdiction by asking itself the wrong question (i.e., whether the employees had applied for membership, paid at least a dollar, etc.), and failing to deal with the question remitted to it (i.e., whether the employees in question were members of the union at the relevant date).

33. The payment of a dollar in respect of initiation fees or monthly dues was initially viewed as involving “some financial sacrifice” on the part of the employee seeking to join a union. However, over the ensuing years that characterization became increasingly artificial as a result of inflation. Thus, in 1988 the Board (through its Alternate Chair) wrote as follows in *Calvano Lumber & Trim Co. Ltd.*, [1988] OLRB Rep. Aug. 735:

9. Whatever may have been the case 35 years ago when *RCA Victor* was decided (when, it might be noted, there was no provision in the *Labour Relations Act* equivalent to section 1(1)(l)), it is obvious, today, that a payment of one dollar cannot realistically be considered to be much of a “financial sacrifice”. Its purpose is symbolic, and to provide a simple statutory formula for determining union membership without, in each case, an inquiry into the terms of the union constitution defining initiation requirements, membership obligations and so on. In order to facilitate the processing of certification applications (which now number well over a thousand each year), the Legislature has established a simple standard of “membership” for statutory purposes. It is important that trade unions relying on that formula adhere to the prescribed standard. Ordinarily, the membership evidence is not revealed to the employer (see section 111 of the Act and *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223), and against that background the Board is entitled to demand strict compliance with the statutory requirements. Failure to collect the \$1.00 payment contemplated by the Act, or to conduct the inquiries necessary to complete the Form 80 declaration, can result in the rejection of the union’s membership evidence and a dismissal of the application.

10. On the other hand, there comes a point when technical adherence to alleged “rules” drifts into artificiality and becomes increasingly remote from the real life experience of employees in the work place, whose interests must also be considered if the Board is to faithfully fulfill its statutory mandate. Does the ordinary employee in a plant, or on a construction site, seriously distinguish between a “bona fide” loan of a dollar which s/he “solemnly” undertakes to repay, or an outright gift of what, today, is a nominal amount? Does a dollar received by an employee in this way cease to be “his own”, to use as s/he wishes, because it may be a gift, or there may be no undertaking or real concern about its repayment? We do not think so; moreover, as early as 1958 in *Webster Air Equipment Co. Ltd.*, 58 CLLC ¶18,110 the Board indicated that it was “not greatly concerned about isolated instances of money being advanced by one employee to another”. The Board recognized that these cash transfers were a natural incident of an established relationship between fellow employees who accommodate each other, from time to time, when they are short of funds. Usually there is an expectation of reciprocity, but no one keeps a ledger cataloguing the number of cups of coffee, soft drinks, muffins, chocolate bars or small sums owed to, or by, a fellow employee.

11. What the Board was suggesting in *Webster Air Equipment*, and what we here confirm, is that the Board will not ordinarily be concerned about the advance of small sums of money from one rank-and-file employee to another whether by way of “gift” or “loan”, nor will they be the subject of Board scrutiny, unless the evidence suggests that a union official or the “collector” or perhaps some fervent union supporter was, in effect, “buying memberships”. In such cases the Board might well disregard the membership documents altogether or seek the confirmatory evidence of a representation vote. However, it is totally artificial and unrealistic to focus upon the expressed or presumed “intent to repay” of an individual employee in respect of the relatively trivial sum necessary to meet a statutory requirement which today is merely symbolic.

Nevertheless, it remained necessary for the Board to devote some of its limited resources to investigating and, where warranted, conducting inquiries into “non-pay” (and “non-sign”) allegations, in accordance with the procedures described as follows in *Estonian Relief Committee in Canada*, [1988] OLRB Rep. Nov. 1167:

16. The first step in that “usual investigation” is to see whether any membership evidence has been submitted in the name of the employee who it is alleged did not sign a card or make the payment referred to on the receipt or other documentary evidence of payment accompanying the card. The concern raised by a “non-sign” or “non-pay” allegation is that the Board has been invited to act on documentary evidence which may not reflect the truth about whether the person said to be a member has actually applied for membership or paid to the union on his own

behalf the amount shown. If there is no document, there is no such concern. If there is a document purporting to be evidence of membership of the subject employee, a labour relations officer will interview that employee in private. If the interview discloses any matter which is cause for concern, either standing alone or in light of the contents of the Form 9 declaration filed by the union, the Board will schedule the matter for hearing, summon those persons who may have knowledge of the matters in issue and, at the hearing, conduct its own inquiry....

See also *Roytec Vinyl Co.*, [1990] OLRB Rep. June 727.

34. The Bill 40 amendments concerning “membership evidence” included the repeal of the definition of “member” and the enactment of the following provisions:

8.- (1) Upon an application for certification, the Board shall ascertain,

- (a) the number of employees in the bargaining unit on the certification application date; and
- (b) the number of those employees who are members of the trade union on that date or who have applied to become members on or before that date.

(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

- 1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
- 2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
- 3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

• • • •

9.1 (2) If no representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if it is satisfied that more than 55 per cent of the employees are members of the trade union on the certification application date or have applied to become members on or before that date.

Section 105(4) was not amended by Bill 40 and thus remains in the Act exactly as quoted above. However, Bill 40 added the following new provision as section 105(4.1):

In determining whether a person is a member of a trade union or has applied for membership,

the Board shall not consider whether the person has made any payment that the trade union may require.

35. It is abundantly clear from those revisions to the Act that the Legislature has eliminated any need for the Board to consider or determine whether or not any employee has paid a dollar or any other monetary sum to the Union. Nor do we find any merit in Company counsel's suggestion that although the matter of whether a payment has actually been made need not be considered, the Board must still be concerned about whether the employees agreed to pay anything to the Union, and about whether the employees have applied to become members in accordance with the requirements of the Union's constitution. To adopt that strained interpretation of the revised Act would be to attribute to the Legislature an intention to have the Board adopt an approach similar to that described by the Supreme Court of Canada in *Metropolitan Life, supra*, which approach has long been recognized by the Board and the Legislature to be unnecessary, impractical, and unworkable in the context of certification applications. The revised provisions are clearly intended to further streamline the certification process by eliminating the need for the Board to devote any of its limited resources to considering whether employees who have applied to become members of a union have made the symbolic gesture of paying the relatively trivial sum that was previously necessary to meet one of the pre-Bill 40 statutory requirements of membership.

36. The Act, as revised by Bill 40, instructs the Board to ascertain, upon an application for certification, the number of employees in the bargaining unit who are members of the trade union on the certification application date *or who have applied to become members on or before that date*. Under the new Rules, the evidence which must be filed by an applicant to establish either of those alternatives is generally referred to as "membership evidence", and is required to be in writing, to be signed by the employee, and to disclose the date on which the employee's signature was obtained. It is unnecessary for purposes of these proceedings to determine whether the Union cards filed by the applicant establish that the employees who signed them are members of the applicant. It is sufficient for the Board to find, as we do, that those cards indicate that the employees whose signatures they bear have applied to become members of the applicant, and that the cards meet all of the other requirements of the Act and the Rules. While the Union's constitution might arguably be of some relevance (subject to section 105(4) and (4.1) of the Act) if the Board were called upon in these proceedings to determine whether or not employees were actually members of the Union on the certification application date, it is of no relevance in determining whether employees "have applied to become members on or before that date". Thus, the Board declined to direct the Union to produce a copy of its Constitution as the Board was (and remains) of the view that it was not of any relevance to the matters in issue before us in these proceedings.

37. As noted above, Company counsel was provided with a blank Union card, was advised that all of the cards were signed after January 1, 1993, and was further advised that they were collected by more than one receiver. He was also advised that all of the cards were filed with the Board on the January 25, 1993 certification application date. After receiving that information and the Board's oral ruling quoted in paragraph 31 of this decision, he did not further pursue the matters set forth in paragraph 11 of the Company's response. He also did not indicate any legitimate basis for obtaining disclosure of any additional information concerning the membership evidence filed by the Union. In view of its obvious sensitivity in the labour relations context, information about whether a person does or does not desire to be represented by a union must remain confidential unless there are compelling reasons for its disclosure. In this regard, section 113(1) of the Act provides as follows:

The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and

its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

That provision protects from disclosure (except with the consent of the Board) not only the identity of persons who sign union cards as applicants for membership, but also the identity of persons who sign them as collectors (or receivers), because serving in that capacity generally indicates a desire to be represented by the union. While information concerning the precise number of persons who collected cards might seem relatively innocuous at first blush, providing it could place them in jeopardy in some circumstances. For example, in a case in which there were only two collectors, an employer who had previously learned “through the grapevine” that employees A and B had each collected some cards would become cognizant that those two employees had collected all of the cards if the Board were to disclose the precise number of collectors. Although the disclosure of that information may be warranted in some circumstances, there is nothing in the circumstances of the instant case which makes it appropriate for the Board to depart from its usual practice of merely indicating either that there was one collector or that there was more than one collector.

38. Information concerning whether any consideration passed from employees to the collectors of the cards is of no relevance in these proceedings, for the reasons set forth above. Moreover, by providing Company counsel with the aforementioned blank Union card, the Union effectively informed Company counsel that there was no evidence before the Board that any such consideration was requested or paid (as the wording of the card makes no mention of consideration).

39. On February 23, 1993, immediately after the Board gave the oral ruling quoted in paragraph 16 of this decision, Ms. Gillespie moved that the application for certification be dismissed on the grounds that her clients had a reasonable apprehension of bias on the part of the Board. She initially sought to call witnesses in support of that request, but subsequently agreed to argue it on the basis of agreed facts. In addition to the facts set forth above in respect of the address to which the (Form B-4) “green sheets” were sent, the (faxed) form in which that notice was initially posted before the actual “green sheets” were couriered to the site, the denial of the intervenors’ request that the hearing be held in Thunder Bay, the Board Officer’s indicating to the parties that (subject to the Board’s usual second check of the membership evidence) the Union appeared to be in an interim certifiable position, and the Board’s ruling that the intervenors’ petitions could not be considered because they were filed after the certification application date, intervenors’ counsel relied upon the following additional facts in support of her motion:

1. During the course of the hearing of this application on February 22, a Board employee entered the hearing room while the Board was in session and handed a telephone message slip to the Vice-Chair. The Vice-Chair then passed that slip to Union counsel without comment.
2. On February 22 at a time when neither the panel nor anyone else from the Board was present in the hearing room, a courier delivered to Union counsel documents which did not relate to this application for certification.
3. The letter dated February 19, 1993 (quoted in paragraph 13 of this decision) from Robert E. Charney to counsel for the intervenors was copied to the applicant’s general counsel but was not copied to Company counsel.

40. Although counsel for the Company did not indicate disagreement with any of the facts

stipulated by intervenors' counsel in support of her motion (and agreed to by Union counsel), and did not stipulate any additional specific or material facts on which the Company sought to rely, Company counsel nevertheless asserted that the Board should hear the evidence which the intervenors would have adduced if the Union had not agreed to the facts stipulated by intervenors' counsel, in order to afford him an opportunity for cross-examination. After hearing and recessing to consider submissions on that matter, the Board made the following unanimous oral ruling:

Having duly considered the submissions of counsel regarding the procedure which should be adopted by the Board in respect of the intervenors' motion that the application for certification be dismissed by reason of [a reasonable] apprehension of bias, we have concluded that it is now appropriate to hear argument on that motion. The Union, through its counsel, has agreed to all of the facts which the intervenors, through their counsel, have indicated that they rely upon in support of the motion. The Company has taken no position on the validity of the motion and has not indicated any disagreement with the facts stipulated by intervenors' counsel and agreed to by Union counsel, nor has it stipulated any additional specific facts on which the Company seeks to rely. Nevertheless, Company counsel asserts that the Board should hear the evidence which the intervenors would have adduced if the Union had not agreed to the facts stipulated by intervenors' counsel, in order to afford him an opportunity for cross-examination. It is clear to us from the totality of his submissions that Company counsel seeks to have the Board permit him to engage in a fishing expedition. We are not prepared to do so. It is well established in the jurisprudence of the Board and the Courts that labour relations delayed are labour relations defeated and denied. The provision of "effective, fair and expeditious methods of dispute resolution" is one of the express purposes set forth in section 2.1 of the Act. Company counsel also asserted that the Board should hear *viva voce* evidence because the Union has not admitted the inferences which Company counsel apparently wishes to assert should be drawn from the admitted facts. We see no merit in that assertion. Each counsel is entitled during the course of argument to argue that the Board should draw inferences from the facts stipulated by the intervenors and admitted by the Union. We also find no merit in Company counsel's assertion that the Board should hear evidence concerning whether or not the intervenors have a subjective apprehension of bias, as it is well established that the test for bias is an objective one.

41. The Board then proceeded to hear the submissions of counsel regarding the intervenors' motion and, after a brief recess, made the following oral ruling:

For reasons which will issue at a later date, the intervenors' motion that the Union's application for certification be dismissed on the basis of a reasonable apprehension of bias is hereby unanimously denied.

Although counsel did not refer the Board to any cases, they each argued that motion on the basis of the applicable test being that of a "reasonable apprehension of bias". That language appears in a number of administrative law cases such as *Re Marques et al. v. Dylex Ltd. et al.* (1977), 81 D.L.R. (3d) 554 (Ont. Div. Ct.); *Committee for Justice and Liberty et al. v. National Energy Board* (1976), 68 D.L.R. (3d) 716 (S.C.C.); and *R. v. British Columbia Labour Relations Board, ex parte International Union of Mine, Mill and Smelter Workers* (1964), 45 D.L.R. (2d) 27 (B.C.C.A.). In Reid and David, *Administrative Law and Practice* (2nd Ed., 1978), at page 259, it is described as "the usual formulation". Other cases have referred to the applicable test as being a "real likelihood" of bias: see, for example, *R. v. Ontario Labour Relations Board, ex parte Hull* (1963), 39 D.L.R. (2d) 113 (O.H.C.) and *Re Glassman and Council of the College of Physicians and Surgeons*, [1966] 2 O.R. 81 (C.A.). See also Mullen, *Administrative Law* (1973), at paragraph 48, in which it is stated a "common test used by the courts is to ask whether a reasonable man in the applicant's position, conversant with all of the facts, would have considered that there was a real likelihood that the decision-maker was biased." Regardless of how the test is articulated, it is clear that actual bias need not be proven. All such tests depend upon the appearance of bias and not its actuality, as the concern is not only that justice should be done but also that it should be seen to be done. However, it is also clear that the test is an objective one, and that despite their actual state

of knowledge, persons asserting that they have a reasonable apprehension of bias are treated as having knowledge of readily ascertainable and easily verifiable facts: 1 C.E.D. (Ont. 3rd) ¶53.

42. In assessing the validity of Ms. Gillespie's contention that the aforementioned facts give rise to a reasonable apprehension of bias on the part of the Board, we duly considered all of the material circumstances. As indicated above, the Union's failure to provide the Board with the Company's correct address led to the Company initially posting a faxed copy of the Form B-4 notice to employees until the actual "green sheets" arrived at the site by courier. However, the faxed copy provided employees with all of the information which would have been available to them if the original "green sheets" had been the first notice posted. Moreover, as noted above, both the faxed and original "green sheets" contained all of the information required by the notice requirements of the rules of natural justice, the *Statutory Powers Procedure Act*, the *Labour Relations Act*, and the Rules of Procedure.

43. Although it is unfortunate that some employees experienced difficulties in contacting the Board and were dissatisfied with the Board's declining to provide them with additional information and legal advice, if the Board had done so it could well have created a reasonable apprehension of bias assertable by another party, such as the Union, in that the Board, which is required to hear and impartially decide the matters which come before it, would have been improperly advising a party in relation to a matter on which that party could subsequently be appearing before the Board.

44. When representatives of the parties met with the Board Officer on February 17, they went through the usual matters covered at such a meeting, including the bargaining unit description, the list of employees, the form of the membership evidence, and the contents of the Form A-4 declaration. Although he advised them that, subject to the Board's usual second check of the membership evidence, the Union appeared to be in an interim certifiable position, his written report also indicates that both he and the parties recognized that a hearing would be required to deal with the five outstanding matters listed in that report, including the "petition/intervention". Thus, we are satisfied that nothing which occurred at that meeting gave rise to a reasonable apprehension of bias on the part of the Board or the Board Officer.

45. As regards the intervenors' request that the hearing be held in Thunder Bay, the reasons why that request could not be accommodated are set forth in paragraph 11 of this decision and need not be repeated. We would also note that the intervening employees were duly represented by counsel at the hearing of this matter in Toronto and participated in the hearing, through their counsel, to the full extent permitted by the Act and the Rules. While the intervenors undoubtedly wish to have the Board consider their petitions in hearing and deciding this application, the fact that the Act precludes the Board from doing so cannot legitimately be said to give rise to a reasonable apprehension of bias on the part of the Board.

46. In her motion and supporting submissions on behalf of the intervenors, Ms. Gillespie asserted that facts number 1 and 2 (as set forth in paragraph 39 of this decision) created a reasonable appearance that the applicant is using the Board's offices to conduct its business, and that the Board has permitted its employees to become agents of the applicant for the purpose of facilitating the business of the applicant. We find no merit whatsoever in that assertion. As an administrative tribunal, the Board operates somewhat more informally than a Court. If someone had telephoned the Board's office and left a message for Ms. Gillespie, the Board, as a matter of courtesy, would have relayed that message to her in precisely the same manner in which it relayed the aforementioned message to Ms. Kelly. That the Board's action in doing so was not viewed by counsel as being in any way improper is evident from the fact that no objection was taken to it at the time. If

Ms. Gillespie, Mr. Shanks, or their respective advisors had expressed any concern about the matter, the Board would have immediately alleviated that concern by confirming precisely what had occurred. In assessing whether that matter (and the matter described in the next paragraph) would give rise to a reasonable apprehension of bias, it must be remembered that the intervenors were represented by counsel and, therefore, had the opportunity to obtain her professionally informed assessment of what was occurring.

47. Similar comments are applicable to the courier's delivery of documents to Union counsel in the hearing room at a time when neither the panel nor anyone else from the Board was present. Except in relatively rare cases in which parts of a hearing may be conducted *in camera* (in accordance with section 9(1) of the *Statutory Powers Procedure Act*), the Board's hearings and, therefore, the hearing rooms in which they are conducted, are open to the public. Thus, members of the public, including couriers, are generally at liberty to enter the Board's hearing rooms. Although the Board, as master of its own procedure, can undoubtedly make such orders and give such directions as it considers necessary for maintenance of order at a hearing, it is difficult to see what legitimate interest would be advanced by precluding counsel from receiving couriered documents in a hearing room while the Board is not in session. Indeed, the delivery of documents to counsel during the course of a hearing is not unusual (and often assists in avoiding delay). While we appreciate that employees such as the intervenors would not likely be familiar with Board processes and procedures, we do not believe that the circumstances described above could cause such employees to reasonably conclude that the applicant was improperly using the Board's offices to conduct its business, or that the Board has permitted its employees to become agents of the applicant for the purpose of facilitating the business of the Union.

48. We also find no merit in the submission that a reasonable apprehension of bias was created by the fact that the above-quoted letter dated February 19, 1993 from counsel for the Attorney General of Ontario to Ms. Gillespie was copied to counsel for the Union but not to Company counsel. The Board is an independent tribunal, completely separate from the Attorney General's office. Moreover, it is difficult to imagine how counsel for the Attorney General could possibly create a reasonable apprehension of bias on the part of his office, much less the Board, by merely forwarding to counsel for the party opposite in interest a copy of his letter to intervenors' counsel indicating that he would not be participating in the hearing for the reasons described in that letter (and noting a leading case which counsel, in any event, would be under a professional duty to draw to the attention of the Board).

49. Thus, for all of the foregoing reasons, the Board concluded that the circumstances described above, whether considered individually or cumulatively, did not give rise to a reasonable apprehension of bias on the part of the Board (or any of its personnel), and that reasonable persons in the intervenors' position, conversant with all of the facts, would not consider that there was a real likelihood of bias.

50. After the Board had given its "bottom line" oral ruling on that matter, counsel for the intervenors requested that the hearing of this application be adjourned, pending an application for judicial review. Submissions concerning that matter were heard by the Board on the following morning at the request of Company counsel who, at approximately 4:00 p.m. on February 23, advised the Board that he wished to be given an opportunity to research the issue that evening. Although the Company did not expressly join in the intervenors' request that the hearing of this application be adjourned pending an application for judicial review, its counsel made submissions in support of the intervenors' request, with the proviso that the adjournment be limited to a period of three months. Union counsel, on the other hand, opposed the granting of any adjournment.

51. On February 24, after hearing and recessing to consider the submissions of counsel, the Board unanimously ruled that the requested adjournment would not be granted for the following reasons:

The Courts have made it clear that the Board, as master of its own procedure, is entitled to proceed with the hearing of a matter notwithstanding a pending or anticipated application for judicial review: see, for example, *Cedarvale Tree Services Ltd. v. Labourers' International Union of North America, Local 183* (1971), 71 CLLC ¶14,087 (Ont. C.A.). As noted in an earlier ruling which we made in these proceedings, the Courts and the Board have also recognized that labour relations delayed are labour relations defeated and denied, and that expedition is particularly important in the context of certification applications. The Board does not generally adjourn a hearing to permit a party to file an application for judicial review, and we see nothing in the circumstances of the instant case that would warrant a departure from the Board's usual practice in that regard. Indeed, both [Ms. Gillespie and Mr. Shanks] have acknowledged that it would be useful for the Board to proceed to at least hear submissions on the Company's contention that the Board should exercise its discretion to order a representation vote in this matter. Moreover, it appears to us that an application for judicial review might well be premature at this juncture, as the Board has not yet determined whether the applicant will be certified. Thus, having regard to all of the circumstances, the Board denies the requested adjournment.

52. The Board then proceeded to hear submissions concerning the Company's request that a representation vote be taken, and regarding the aspects of the bargaining unit description which remained in dispute between the Company and the Union. Intervenors' counsel supported the request for a representation vote, but took no position on the description of the bargaining unit. Argument concerning the bargaining unit description proceeded on the basis that if the Board found it necessary to resolve any of the facts in dispute between the Union and the Company in order to determine the appropriate bargaining unit, a Board Officer would be appointed to inquire into and report to the Board concerning the disputed facts. However, the Board has not found it necessary to do so, as nothing turns on the disputed facts in the circumstances of this case.

53. As indicated earlier in this decision, agreement was reached on some portions of the bargaining unit description on February 17, when the parties representatives met with a Board Officer. They agreed to the following description, with the exception of the underlined portions whose addition is proposed by the Company but opposed by the Union:

ALL EMPLOYEES OF HEMLO GOLD MINES INC. C.O.B. AS GOLDEN GIANT MINE DIVISION INVOLVED IN MINING AND MILLING LOCATED APPROXIMATELY 36.5 KILOMETRES EAST OF THE TOWN OF MARATHON, EXCLUDING THE QUARRY OPERATION, SAVE AND EXCEPT SUPERVISORS, PERSONS ABOVE THE RANK OF SUPERVISOR, OFFICE, CLERICAL, TECHNICAL, SALES, SECURITY STAFF AND STUDENTS EMPLOYED DURING THE SCHOOL VACATION PERIOD.

54. In support of his client's request that "c.o.b. as Golden Giant Mine Division" be added to the bargaining unit description, Company counsel referred the Board to *Beatrice Foods (Ontario) Limited*, [1982] OLRB Rep. June 815. That decision pertained to a request by Beatrice Foods (Ontario) Limited that the Board amend the style of cause in those proceedings to show its name as "Beatrice Foods (Ontario) Limited, Model Dairy Division". In denying that request, the Board wrote:

3. Having considered the respondent's request, the Board is of the view that it would not be appropriate to amend the style of cause in the manner requested by the respondent. While a corporation may be subdivided into a number of divisions for operational, marketing and other purposes, the creation of such internal divisions does not change the fact that the legal entity which is the employer remains the corporation itself, which must have "Limited", "Incorporated", "Corporation", "Ltd.", "Inc." or "Corp." as the last word in its name (see *Business Corporations Act*, R.S.O. 1980, c. 54, s. 8, and *Canada Corporations Act*, R.S.C. 1970, c. C-32,

s. 25). To forestall various difficulties that might otherwise arise with respect to such matters as enforcement of Board decisions and orders, it is preferable (although it has not, to date, been the Board's unvarying practice) to include only the corporate name of an (incorporated) employer in the style of cause of an application or complaint. If, as in the present case, it is appropriate to restrict the applicant's bargaining rights to employees who work in a particular division that has been established by their corporate employer, this can be accomplished by referring to that division in the description of the bargaining unit, as was done in the aforementioned decision dated May 31, 1982 in which the unit was described as "all employees of the respondent in its *Model Dairy Division* at Sault Ste. Marie..." (emphasis added).

55. There is a dispute between the applicant and the responding party concerning whether or not the Company actually has any divisions. However, it is common ground between them that it does not carry on business in more than one division at the site to which this application pertains. In dismissing a request similar to that which has been made by the Company in the instant case, the Board wrote as follows in *Hunter Douglas Canada Limited*, [1985] OLRB Rep. Apr. 535:

3. The parties are in agreement on the description of the bargaining unit appropriate for collective bargaining with the exception of a difference on whether the bargaining unit ought to be described with reference to in the City of Mississauga or with reference to in its Architectural and Window Covering Products Division in the City of Mississauga. It is the position of the applicant that the bargaining unit ought to be defined with reference to the City of Mississauga. It is the position of the respondent that the bargaining unit ought to be defined with reference to the named Division.

4. At the present time the respondent has only one facility in Mississauga. However, the respondent stated that while it had no plans to put in a new division in Mississauga, it could put another division in Mississauga. The respondent is a large Canadian organization which has three other divisions in addition to the division which is affected by this application. Other divisions of the respondent have operations in the greater Metropolitan Toronto area.

5. The Board's practice with respect to defining the geographic boundaries of appropriate bargaining units and ensuring the stability of bargaining rights was set forth in *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293 at page 295, where the Board stated:

6. The Board in *Wix Corp Ltd.*, [1975] OLRB Rep. Aug. 637 canvassed in some detail the Board's practice with respect to defining geographic limitations in the appropriate bargaining unit. Apart from the construction and perhaps certain service industries, the Board's policy, where the employer has employees at only one location within a municipal area, is to describe the bargaining unit in terms of the municipality itself (*Perimeter Industries Limited*, [1973] OLRB Rep. March 174). On occasion the Board will expand its definition of the bargaining unit to encompass an area greater than a single municipality (see *The Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. Feb. 1178; *The Adams Furniture Company Limited*, [1975] OLRB Rep. June 491; and note as well the Board's normal unit of the Municipality of Metropolitan Toronto), but is reluctant to do so in the absence of compelling reasons (*Wittich's Bread Limited*, [1969] OLRB Rep. Jan. 1019; *Del Zotto*, [1972] OLRB Rep. June 637 and *Canada Safeway Limited*, [1972] OLRB Rep. Mar. 262). The primary reason for this policy of municipality-wide bargaining units is the Board's concern for stability of bargaining rights; i.e. the union's bargaining rights will not be affected by a subsequent move of the employer's operation to some other location within the same municipality. On the other hand, actual accretions to the employer's operations within the municipality, such as a second or third plant, will automatically be covered by the union's certificate. To this latter extent the right of self-determination of a bargaining agent by the employees at these new locations is compromised, in favour of the over-riding concern for stability of bargaining rights.

6. In the instant application the respondent has one facility in Mississauga and has no plans for any subsequent facilities in Mississauga. The arguments of the respondent based upon any future facilities in Mississauga are based upon hypothetical facts and are therefore purely speculative in nature. While section 3 of the Act does state that every person is free to join a trade

union of his own choice and to participate in its lawful activities, it ought not to be read in isolation. Section 3 is to be applied to the facts in this application. On the one hand the interests of present employees who have indicated they wish to be represented by the applicant are to be considered and on the other hand there are the highly speculative interests of future persons who may or who may not become employees of the respondent in Mississauga. As the Board stated in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept., 1250, nowhere is the balancing of the statutory objectives more evident than in the Board's normal practice of circumscribing the geographic scope of bargaining rights by reference to the municipal boundary within which an employer operates.

7. In balancing the interests of present employees against the possible interests of unforeseen future employees, the balance is struck in favour of addressing the interests of present employees in the stability of their bargaining relationship with the respondent. With respect to the respondent's arguments that the appropriate bargaining unit be defined with respect to one of its divisions, the Board is not persuaded that its arguments have any merit. The respondent acknowledges that the bargaining unit ought to be described without reference to a municipal address in the interests of stability of bargaining rights while arguing for the reference to one of its divisions in defining the appropriate bargaining unit.

8. In our view, the arguments of the respondent must fail. The inclusion of a reference to a division of the respondent in the appropriate bargaining unit is a destabilizing factor in bargaining rights. It is arguably open to the respondent to change its internal corporate structure and change and/or substitute a different division in its present premises in Mississauga. It is arguably even easier to effect a change in the internal corporate structure of the respondent than it is to relocate to a new address in Mississauga. For these reasons the appropriate bargaining unit is to be described without reference to a division of the respondent in the City of Mississauga.

See also *Belkin Inc.*, [1986] OLRB Rep. Aug. 1050. We agree with the reasoning contained in those decisions and find the labour relations policy considerations described therein to be equally applicable in the present case. Thus, the Company's request that "c.o.b. as Golden Giant Mine Division" be added to the bargaining unit description is denied.

56. As noted above, the Company also seeks the addition of "involved in mining and milling", and "excluding the quarry operation". The rationale advanced for the addition of "mining and milling" is that since the site is not located in a municipality, it is desirable to further tie down the location by reference to what Company counsel characterized as "the significant geographical structures located on the property". The exclusion of the "quarry operation" was also asserted by Company counsel to be warranted on the basis of a need for greater geographical precision, as well as on the basis that the persons who work there do not share a community of interest with the Company's employees engaged in mining and milling. It is common ground between the applicant and the responding party that within the scope of the bargaining unit sought by the Union, the Company has no employees involved in anything other than mining and milling. The work of the quarry operation is contracted out to another company, whose employees are already represented by the Union. The quarry operation is situated about a quarter mile from the mine. All of the production from the quarry operation is used to backfill the mine.

57. Having duly considered all of the submissions of counsel, we have concluded that the geographical description to which the parties have agreed (i.e., "located approximately 36.5 kilometres east of the town of Marathon") adequately describes the location of the site and should not be further qualified by adding "involved in mining or milling" and/or "excluding the quarry operation". As submitted by Union counsel, issues pertaining to the contracting out of the work at the quarry operation are properly matters for collective bargaining. We do not find it appropriate to inhibit or preclude such bargaining by artificially narrowing the geographic scope of the bargaining unit to exclude an area in which the Company currently has no employees, but which is clearly a functionally related part of the Company's mining claim site to which this application pertains.

Accordingly, the Board, in the exercise of its discretion under section 6(1) of the *Labour Relations Act*, hereby determines that the following constitutes a unit of employees that is appropriate for collective bargaining:

all employees of Hemlo Gold Mines Inc. located approximately 36.5 kilometres east of the town of Marathon, save and except supervisors, persons above the rank of supervisor, office, clerical, technical, sales, security staff and students employed during the school vacation period.

58. As noted earlier in this decision, the Company has withdrawn its position (set forth in paragraph 11(a)(iv) of its response) that the applicant is not a trade union the Board should recognize. Moreover, section 107 of the Act provides:

Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of subsection 1(1), such finding is proof, in the absence of evidence to the contrary, in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.

The applicant has been found to be a trade union in a number of earlier proceedings under the *Labour Relations Act*. Thus, in the absence of any evidence to the contrary, the Board, in accordance with section 107, finds that the applicant is a trade union within the meaning of section 1(1) of the Act.

59. The Board further finds that on or before the certification application date of January 25, 1993, 126 of the 216 employees in the bargaining unit on that date had applied to become members of the applicant. As noted above, section 8 of the Act includes the following provisions concerning representation votes:

(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

Company counsel requested the Board to exercise its discretion under section 8(3) to direct that a representation vote be taken in this case. He based that request upon a variety of circumstances, including the delayed posting of the original "green sheets", the isolated location of the worksite, the difficulty which some employees experienced in attempting to understand and obtain advice about their legal position, the intervenors' filing of the aforementioned petitions, the Board's refusal to change the venue of the hearing to Thunder Bay, the approximately 58% level of employee support for the Union (which Company counsel characterized as "not overwhelming"), the possibility that some employees who signed Union cards may have had a "change of heart", and the desirability of permitting employees, whom he described as being quite conversant with the democratic process, to express their true wishes through a representation vote. That request was supported by counsel for the intervenors but opposed by counsel for the applicant.

60. It would be inappropriate for the Board to direct that a representation vote be taken on the basis of the petitions filed by the intervenors because, as noted above, section 8(4) of the Act precludes the Board from considering them. As regards the other bases put forward in support of the requested vote, we note that despite the isolated location of the worksite, the intervenors were able to retain counsel, file an intervention and notice of constitutional question, and make extensive submissions to the Board on the matters raised through their counsel. While employee support

for the Union is clearly not unanimous, the cards which were duly filed by the Union in accordance with the requirements of the Act and the Rules demonstrate that the Union had the support of over 55% of the employees in the bargaining unit at the material time. Having duly considered the submissions of counsel and all of the circumstances of this case, we are unanimously of the view that there are no circumstances present which warrant the exercise of the Board's discretion under section 8(3) of the Act to direct that a representation vote be taken.

61. Section 9.1(2) of the Act provides:

If no representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if it is satisfied that more than 55 per cent of the employees are members of the trade union on the certification application date or have applied to become members on or before that date.

62. For the foregoing reasons, a certificate will issue to the applicant, pursuant to section 9.1(2) of the Act, for the bargaining unit described in paragraph 57 of this decision.

0913-89-U; 0914-89-R Ontario Nurses' Association, Complainant/Applicant v. Kitchener-Waterloo Hospital, Respondent v. Group of Employees, Objectors

Bargaining Rights - Remedies - Sale of a Business - Unfair Labour Practice - Board, in earlier decision, declaring that sale of a business occurred but that bargaining rights terminated and that collective agreement no longer binding - Parties disputing effective date of declaration - Board considering it appropriate to make declaration effective as of date of "sale", as if transaction never occurred, and so directing - Board also ruling on parameters of available relief in connection with earlier finding that employer had violated section 67 of the Act - Alternate Chair appointed to meet with parties and assist them in resolving outstanding issues

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

DECISION OF THE BOARD; March 15, 1993

1. In a prior decision ([1991] OLRB Rep. Oct. 1130), the Board (by majority) concluded that a sale of part of a business had occurred from St. Mary's Hospital to Kitchener-Waterloo Hospital (the "Hospital", or "Kitchener-Waterloo") within the meaning of section 64 [formerly section 63] of the Act and that Kitchener-Waterloo Hospital had committed an unfair labour practice in certain respects. By operation of section 64, both bargaining rights and the collective agreement were in effect at Kitchener-Waterloo until the Board otherwise declared. The Board did declare that the bargaining rights of the Ontario Nurses' Association, ("O.N.A."), at the Hospital were terminated, and that the Hospital was no longer bound by the collective agreement between O.N.A. and St. Mary's. The Board reserved on the issue of the effective date of the declarations terminating those rights. The Board also reserved on whether sections 51 [formerly section 50], 65 [formerly section 64], and 68 [formerly section 67] of the Act had been breached by the Hospital. The Board concluded that the Hospital had breached section 67 [formerly section 66] of the Act. The Board remained seized with respect to all remedial aspects. These matters were remitted to the parties to afford them an opportunity to settle them.

2. Unfortunately, the parties were not able to resolve the remaining matters, and in early

August, 1992, counsel for the Hospital wrote to the Board asking that the Board deal with the matters described above, and do so without a hearing, on the basis of written submissions from the parties.

3. Shortly thereafter, the Board issued two decisions, in which it directed extensive written submissions from all parties, including comprehensive statements of material facts upon which each might rely, with respect to the issues remaining, and in which the Board set a time- table for the filing and exchanging of the written submissions. The submissions of the parties were filed with the Board on or before October 27, 1992.

4. A more complete recital of the facts can be found in the earlier decision (see paragraphs 11 to 32 therein). O.N.A. was the bargaining agent for the nurses at St. Mary's. The nurses at Kitchener-Waterloo were unorganized. Through a mutual reorganization plan, the two hospitals rationalized services, transferring some from one hospital to the other and closing others. O.N.A. contacted Kitchener-Waterloo Hospital, to request that the parties get together to discuss the transferred services, as O.N.A. was asserting that it had bargaining rights and a collective agreement with respect to the obstetrics and paediatric departments, which were to be transferred from St. Mary's to Kitchener-Waterloo. Kitchener-Waterloo refused to meet with O.N.A., or otherwise discuss the matter, and took the position that O.N.A. had no such bargaining rights and that the collective agreement did not apply.

5. Before they were closed down at St. Mary's and transferred to Kitchener-Waterloo, there were approximately 110 nurses at St. Mary's and 143 at Kitchener-Waterloo respectively in these departments. Kitchener-Waterloo had identified 74 new nursing positions, including full-time, part-time, and casual, that would be created in obstetrics and paediatrics at Kitchener-Waterloo as a direct result of the transfer over of those services from St. Mary's. These were not specific positions that had as such existed until then at St. Mary's. Rather, they were new positions made necessary by the fact that all the obstetrics and paediatrics service would now be provided only at Kitchener-Waterloo. In filling these positions, the Hospital decided that it would first offer them to its own personnel, and around June 19, 1989 it posted the 74 newly-created positions internally. After the internal postings were completed, the Hospital opened the remaining unfilled positions to nurses in the general community, including those then at St. Mary's. Forty-two nurses then in the obstetrics and paediatrics department of St. Mary's applied, along with other nurses from the community. The Hospital offered the vacant positions first to the St. Mary's applicants, and 27 of them accepted. Fifteen of them did not accept the offered jobs, in some cases because the new jobs would have resulted in lower wages, or reduced or different hours. In terms of the timing, although the internal postings were on June 19, 1989, the jobs actually commenced on a staggered basis from the beginning of July until the end of September, 1989. The incremental filling of the new positions occurred because the services were phased out at St. Mary's and transferred on a gradual basis.

6. We turn first to consider the effective date of our declarations that O.N.A. is not the bargaining agent for any of the Hospital's nurses and that the applicable collective agreement is no longer binding. These declarations were made pursuant to section 64(6)(a) and (c) of the Act.

7. There is a dispute between the parties over our jurisdiction to decide as of what date the declarations are to be effective. O.N.A. asserts that the Board has no jurisdiction to make the declarations retroactive. It asserts that the declarations can only be made effective the date of the Board's decision, in this case, October 15, 1991. The Hospital asserts that the Board has the jurisdiction to make the declarations retroactive to the date of the "sale", so that the effect is as if the sale never occurred.

8. The relevant statutory language is found in section 64:

64.

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(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 54, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 54, as the case requires.

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(6) Despite subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any shall be the bargaining agent or agents for the employees in the unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

9. The Board considered this issue in *Bermay Corporation Limited* [1980] OLRB Rep. Feb. 166. As the Board wrote:

33. The respondent's argument raised the suggestion that an order under Section [64](6)(a) of the Act terminating the collective agreement would relieve the employer of both past and present obligations under the contract. While counsel's argument was not absolutely clear on this point, it seemed to anticipate that a declaration at the present time terminating the collective agreement would retroactively void the agreement from the time of the sale. He also seemed to hold the alternative view that a declaration at this time favourable to the continuation of the collective agreement would mean that it would apply to the transferred employee only from this time forward. It is clear to us, given the very words of the section, that any declaration by the Board under section [64](6)(a) that an employer "is no longer" bound by the collective agreement" can only be prospective in effect. Many rights under the Act, including access to

arbitration, conciliation and the bar against strike and lock-out depend on the existence of a collective agreement. Given the scheme of the Act there are obvious policy reasons to limit the scope to be given to the Board's order in this circumstance. In this regard it is instructive to compare the wording of section 50, by which the Act renders "void" a collective agreement made following a certification obtained by fraud. While, given the outcome of this application, it need not be conclusively determined by this case, it would appear that under section [64](6)(a) the Board cannot rescind the operation of the collective agreement for any period of time prior to the date that an application is filed under the section. (*The Bryant Press Limited*, [1972] OLRB Rep. Mar.186).

10. In *Bermay*, the Board was of the view that its authority under section 64(6) could not be applied retroactively. In reaching its conclusion, the Board interpreted the words "is no longer bound by the collective agreement" to mean that the declaration could only be effective from the time of making the declaration. We note that the issue of retroactivity was not then before the Board, as the Board itself acknowledged at paragraph 33 of its decision. We also note that, notwithstanding its opinion that such a declaration could only be prospective in effect, the Board was of the view that its declaration could be retroactive to the date that the application was filed. No justification was provided for the authority to make the declaration effective as of the application date rather than the decision date, nor for any distinction between that type of retroactivity and retroactivity to a time before the date of application. In any event, the conclusion of the Board on this point was clearly *obiter*.

11. In our view section 64(6) does give the Board the jurisdiction to make its declarations terminating bargaining rights and declaring that a collective agreement no longer applies effective at a time earlier than the date of issuing the declarations.

12. The starting point of the Board's analysis is the purpose of section 64: to preserve, through a variety of legal transactions, the bargaining rights enjoyed by a union and the rights of the employees it represents. This statutory purpose or mischief against which the legislation is directed is relevant in assessing many issues under section 64, not only whether a "sale" has occurred. Section 64(6) is perhaps the most sensitive tool that can be utilized in appropriate circumstances by the Board to ensure that the purpose of section 64 is furthered, and to work out problems which result from a "sale" finding in cases of intermingling. There can be no serious question that the Board has a discretion under section 64(6) with respect to the exercise of its various powers contained therein. That discretion should be exercised in a manner contemplated by the legislation, consistent with the mischief section 64 is directed to, and the overall mandate of the Board to make sound labour relations judgements.

13. When events occur that lead an employer or union to assert that a sale has occurred, the provisions of section 64 require parties to continue to respect those rights and obligations in the absence of any application to the Board and until the Board otherwise declares. This approach removes any hiatus in the representation rights and collective agreement obligations while any dispute is being resolved. And it must be so. Otherwise, employers could delay applications and in practice defeat the purpose of section 64, to preserve existing rights. Employers could engage in a series of corporate transactions, which if timed properly, could have the effect of forever avoiding any collective bargaining obligations. The "default" mode of the legislation, that rights continue to apply until the Board determines otherwise, eliminates this problem. This is why subsections 64(2) and (3) are written in a manner stipulating that obligations continue to apply "until the Board otherwise declares". It is why the relevant words in subsection 64(6) mean that the collective agreement continues to apply until the Board makes a declaration that the successor employer "is no longer bound". They do not mean that the successor will always be bound until the date of the Board declaration.

14. The purpose of section 64 is to ensure that bargaining rights and collective agreement obligations carry forward with no interruption through legal transactions and legal litigation. The purpose is to ensure that rights that ought to be preserved do not lapse in the “in-between” times. But where, for sound labour relations reasons, the Board concludes that those rights ought to be terminated, the statutory scheme does not demand that the terminated rights continue until the date of the Board’s decision. To read section 64(6) in this manner would undercut the purpose of section 64. It would serve to extend bargaining rights until applications could be disposed of, rather than severing them at the time the Board, as directed by the legislation, determines it is appropriate to do so. It would also interpret section 64(6) in a manner that could lead to absurd results.

15. If the orders or declarations could never be effective earlier than the date of the Board’s decision, there would regularly occur serious labour relations problems. One example arises when two inconsistent collective agreements cover the two intermingled businesses. Each union could file grievances under its collective agreement. An employer would likely be in the position of breaching one of those agreements regardless of what it did. Even if bargaining rights were later terminated by the Board, or if it later declared which collective agreement applied, a successor employer would still have breached one of the agreements during the time before the declaration issued, with potentially enormous liability given the time necessary in some cases to litigate these disputes. This is, with respect, an absurd result, one that flows from the interpretation that the Board is without jurisdiction to make its declarations under subsection (6) effective earlier than the date the declarations are made.

16. The Board in *Bermay* acknowledged this problem, but concluded that “it was not unreasonable to expect the parties to make the necessary adjustments in the language of the agreement” (*Bermay*, *supra*, paragraph 27). But section 64 is the vehicle by which the Board resolves problems that the parties cannot. Otherwise, there is no mechanism by which a neutral adjudication can reconcile two inconsistent agreements. To give such a reading to section 64(6) makes no labour relations sense.

17. Further, successorships under the *Labour Relations Act* can and do create problems in the labour relations structure of the workplace. A literal reading of the statute and the scope clauses of the collective agreements can produce a legal regime in apparent conflict with what other parts of the statute require. Generally under the Act, one union becomes the exclusive bargaining agent for a group of employees (section 42(1)), and only one collective agreement can apply, at a given point in time, to that group of employees (section 50). In successorships, where a sale has occurred in a union-union context, until the Board otherwise declares, an intermingled group of employees may have two collective agreements apply to them and have two different bargaining agents. Section 64(6) is there to give the Board the power to resolve problems that the dual bargaining and representation rights may create, and to enable the Board, where appropriate, to issue remedies that return the parties to a normalized labour relationship, with one exclusive bargaining agent and only one collective agreement. If the declarations could not be effective at a time prior to the date of issuance, then there would always be a period of overlapping bargaining rights, which would, in typical scenarios, lead to serious labour relations problems.

18. Nor does it make sense to give section 64(6) an interpretation which would provide incentives to a party to delay the process, in order to ensure that for the longest possible period the collective agreement would be applicable, regardless of the merits of the case and regardless of its eventual outcome. (See *Caressant Care*, [1984] OLRB Rep. Aug. 1060, at paragraphs 32 and 33.)

19. In our view, the language, structure and purpose of section 64, and labour relations common sense, all support the view that the Board has jurisdiction to determine the effective dates

of its declarations under section 64(6)(a) and (c). The Board has held so before. In *Great Atlantic and Pacific Tea Company Limited* [1986] OLRB Rep. Apr. 485, at paragraph 49 therein, the Board declined to follow *Bermay* and it made its declarations retroactive to the date of the sale, as if the sale had never occurred. We agree with this assessment of the Board's jurisdiction. (Also, in this respect, see the discussion of retrospectivity at paragraphs 77 et. seq. in *The Municipality of Metropolitan Toronto* [1992] OLRB Rep. March 315.)

20. What then is the appropriate time at which to terminate the bargaining rights of O.N.A., at Kitchener-Waterloo Hospital, and to declare that the St. Mary's collective agreement no longer applies, insofar as the Kitchener-Waterloo nurses are concerned? In our prior decision, the Board wrote the following:

47. In balancing these considerations, we nevertheless cannot accept the unit sought by O.N.A. We do not consider a bargaining unit consisting only of two departments in a multi-department, multi-service hospital to be appropriate. In our view it would lead to undue fragmentation, and would likely result in serious labour relations problems for all parties. Bargaining units in hospitals are generally defined in terms of "all nurses", or "all employees employed in a nursing capacity", without differentiation based solely upon the department or departments in which particular nurses work at a given point in time. In hospital settings throughout the province, as reflected at St. Mary's where O.N.A. represents the nurses, the employers and the union have generally not delineated units on a departmental basis, for to do so is neither consistent with the administrative operation of hospitals nor to the benefit of the nurses represented by a trade union. Such fragmentation may well impede a nurse's ability to move to other departments within a hospital. It may also seriously impede the efficient running of the hospital.

48. O.N.A. and both St. Mary's and the Hospital treated their nurses as falling within an "all hospital" or "all nurses" grouping. We conclude similarly, given the context in the hospital sector, that the appropriate grouping would be of all the nurses at Kitchener-Waterloo, and not only those in obstetrics and paediatrics. We therefore conclude that the appropriate bargaining units will generally be described as all nurses engaged in a nursing capacity at Kitchener-Waterloo. For reasons that follow, we need not finalize the precise description of the bargaining unit, nor decide whether there should be both a full-time and part-time bargaining unit. (We note that the parties' submissions did not distinguish between the full-time and part-time nurses or units). In so deciding, we are cognizant of the fact that such a bargaining unit here may lead to the extinguishment of O.N.A.'s bargaining rights. But in the hospital sector, and given the evidence, to find appropriate a unit of only the nurses in obstetrics and paediatrics would create serious labour relations problems.

49. We consider next whether a vote ought to be directed. The vote would ask nurses whether they wished to be represented by the applicant. Ordinarily in cases of intermingling, the Board considers the relative percentages in the voting constituency of the unionized and non-unionized employees in determining whether or not to direct a representation vote.

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52. Here, if a vote were to be directed, it would be directed of those nurses properly falling within the all nurses bargaining unit(s) at the hospital. The total number of nurses at Kitchener-Waterloo, full-time and part-time, is approximately 807. We must determine how many of the 807 nurses are nurses or positions which O.N.A. represents. On the facts, 74 positions in obstetrics and paediatrics were created at the Hospital as a direct result of the "sale". Regardless of who actually has filled those positions, given our "sale" finding, 74 positions were transferred over. The union at best therefore represents, in effect, 74 employees at Kitchener-Waterloo. The union thus represents 74 out of 807 nurses, or approximately 9% of the bargaining unit.

53. Such a small percentage of the bargaining unit represented by O.N.A. would not lead us to direct that a representation vote be held. And even if we took the union's best position on the numbers, and accepted O.N.A.'s argument that all 110 nurses in the obstetrics and paediatrics departments at St. Mary's should be considered, the applicant would represent only approximately 14 per cent of the nurses, again too small a number to direct a vote.

54. In these circumstances, we decline to direct a representation vote and we declare that O.N.A. is not the bargaining agent for any of the Hospital's nurses and that the applicable collective agreement is no longer binding.

21. Even though a sale had occurred, in defining the appropriate bargaining unit the Board did not find the bargaining unit requested by O.N.A. to be appropriate. The Board was unwilling to carve out of the larger hospital setting a bargaining unit consisting only of the nurses in obstetrics and paediatrics. The Board was unwilling to create a "like" unit at Kitchener-Waterloo Hospital, for to find such a unit appropriate would have created serious labour relations problems. In order to rationalize the results occasioned by the intermingling, the Board defined the bargaining unit as hospital-wide.

22. In turn, having thus described the appropriate bargaining unit, the Board concluded that O.N.A.'s bargaining rights and the collective agreement ought to be terminated, so that they did not apply at Kitchener-Waterloo. Given that determination, it follows that the declarations ought to be effective as of the date of sale, so that the rights that have been terminated, because of the sale and intermingling, are terminated before serious problems occur.

23. As a general proposition, significant labour relations problems are likely to result when bargaining rights and the collective agreement are terminated, yet nevertheless continue to apply for a period of time to the intermingled business. This is particularly true in a union-union context, where two collective agreements might apply, until the Board otherwise declared. It is easy to see why declarations terminating bargaining rights for one of the unions and its collective agreement ought ordinarily to be made retroactive to the point of sale. Otherwise, there will always be a period during which the two potentially inconsistent collective agreements apply, with the resulting uncertainty, problems, and costs for all interested parties.

24. Even in a single union setting, if the collective agreement applies for any period of time, all the problems of the intermingling would still exist, with two groups of employees performing the same work, but under different terms and conditions. In this respect, we agree with the prior decisions of the Board in *Bryant Press Limited*, [1972] OLRB Rep. April 301, and *Caressant Care*, *supra*, where the Board concluded that the collective agreement continues to apply, until the Board otherwise declares, only to the business or part of the business that has been transferred. An employer would have two workforces, side by side; the employees in the transferred business, and those who had always worked for the successor. The former group would be covered by all the terms of the collective agreement, the latter by none. Having the collective agreement apply for a time, even in the single union context, will only create more problems and uncertainty, and will further defer the resolution of the problems caused by the sale and intermingling.

25. If the Board were to make the declarations here effective as of the application date, as the Board in *Bermay*, *supra*, did, then problems would remain. The collective agreement would apply to the filling of the 74 newly-created jobs in obstetrics and paediatrics, and those positions would have to be filled as required by the collective agreement in effect in June 1989. And this re-staffing according to the collective agreement would obtain in a context where the Board has already concluded that the collective agreement ought not to be applicable at Kitchener-Waterloo. The remedy would therefore be inconsistent with the main finding of the Board that those rights ought to be terminated.

26. The only reason to make the declarations effective as of the application date would be to protect the jobs of the St. Mary's nurses. That, of course, is something that might result, pursuant to section 64, if it had been determined that the bargaining rights of O.N.A. and the collective agreement ought to apply at Kitchener-Waterloo. But the Board reached the opposite conclusion

here. Since bargaining rights have been terminated, for the reasons expressed in our earlier decision, to have the collective agreement apply for some period of time can only be rationalized on the basis of the Board attempting to protect the work opportunities for the St. Mary's nurses. But work opportunities and bargaining rights are not synonymous terms, at least insofar as section 64 of the Act is concerned. It is bargaining rights that section 64 is designed to protect, and, to repeat, we have already determined that these ought to be terminated and not extended to Kitchener-Waterloo.

27. In addition to the reasons already expressed for making the declarations effective as of the date of transaction, picking another date would likely lead to parties litigating matters, rather than encouraging them to attempt to settle their disputes. If the declarations were effective, for example, as of the application date, parties would have to file their application almost immediately after the sale was alleged to have taken place. Failure to file applications in prompt and immediate fashion would mean that any negative consequences occurring between the date of the transaction and the application date would remain, despite Board intervention. There would be little incentive to settle prior to commencing litigation, and no incentive to hold off litigating until a concrete problem arose in the workplace. Alternatively, picking an effective date subsequent to the application date would mean that rights that ought not to be preserved would continue during the time taken to litigate the matter, an obviously undesirable result.

28. For all these reasons, we consider it appropriate to make our declarations effective as of the date of the transaction, as if the transaction never occurred, and we so direct. There may in other circumstances be reasons when it would be appropriate to make the declarations effective other than at the date of sale. There are no such circumstances or reasons here.

29. Given the effective date of our declarations, even if Kitchener-Waterloo Hospital has breached sections 51, 65, and 68 of the Act, matters upon which we reserved earlier, no remedy would issue for any such breaches. Accordingly, we make no further comment in this regard.

30. In our prior decision we found that Kitchener-Waterloo had breached section 67 of the Act in how it filled the 74 newly-created positions (see paragraphs 59-63 of the decision of October 15, 1991). That breach was independent of the sale finding and a remedy should issue putting the aggrieved parties in the position they would have been in but for that breach, a position where the formula used by Kitchener-Waterloo to fill the new positions would not have involved a breach of the Act. Had the Hospital not committed the unfair labour practice, we are satisfied that in filling the 74 newly-created positions in obstetrics and paediatrics, it would have formed a pool of nurses, consisting of the Kitchener-Waterloo nurses who were about to be laid off in the medical and surgical units at Kitchener-Waterloo, and the St. Mary's nurses in obstetrics and paediatrics at the time. From that pool of nurses, the Hospital would have filled the jobs with the nurses who were the most skilled, who had the greatest ability to perform the jobs in question, provided those nurses would have accepted the positions if offered (see paragraph 21 of the Board's prior decision).

31. Since the nurses at St. Mary's who should have been in the pool were working at the time in either the obstetrics or paediatrics departments at St. Mary's, it is quite likely that most or all of the 74 positions would have first been offered to and awarded to St. Mary's applicants, on the basis of their greater skills in the services in question. This is however, a matter that the parties have not yet had a chance to discuss, or to litigate. At this stage, we merely conclude that the appropriate remedy is for the 74 new jobs, identified and created in obstetrics and paediatrics at Kitchener-Waterloo in June, 1989 to be now offered to the appropriate nurses, according to the conditions described above, from a pool of the St. Mary's obstetrics and paediatrics nurses at the time and the Kitchener-Waterloo nurses who were to be laid off.

32. The St. Mary's nurses in this pool who should have been offered the positions are entitled to the right to fill the particular job now, provided they can establish that they would have been offered and accepted such positions if Kitchener-Waterloo had used its originally planned (and untainted) method of selection. They are also entitled to any damages and other remedial relief that might flow because they were not offered the job back in June of 1989, keeping in mind that the terms of the job set by the Hospital apply, and that the jobs are not at collective agreement rates or other conditions. Any damages are subject to the principles of mitigation. If any of the nurses who might have been entitled to and accepted one of the 74 positions has earned more, or enjoyed greater benefits, in the interim than s/he would have, had s/he originally accepted the job, s/he would not be entitled to damages, only the right to now take up the position if s/he so chooses. Conversely, any nurse who can establish both the right of first refusal for a particular position (that s/he should have been offered the job originally) and the fact that s/he would have exercised it at the time, may be entitled to damages even if s/he does not want the job now.

33. Given the obligation to mitigate, the fact that the St. Mary's wages were generally higher than those that were offered for the 74 positions, the fact that no St. Mary's nurse was laid off because of the transfer, and the difficulties in proving that a given nurse would have been offered and would have accepted a position, it seems likely that there may be significant difficulty in establishing damages for many, if not all, of the 74 positions. However, O.N.A. is entitled to seek to establish such harm and any nurse suffering such damages is entitled to be compensated accordingly.

34. The Hospital asserts that damages, or entitlement to the jobs, is limited to the 42 who did apply at the time. It argues that in June, 1989, O.N.A. was already claiming that the collective agreement applied, and if a nurse nevertheless declined to apply for a job, she is no longer entitled. We do not agree. St. Mary's nurses were not offered the jobs on the appropriate basis, but only in a manner that breached the Act. This context is not a variant of the "work now, grieve later" approach. That principle applies to ensure that the workplace can continue to be managed, while resolving certain disputes through the acknowledged mechanism, arbitration. An employee need not, however, comply with a breach of the Act in order to preserve his/her rights to later seek a remedy for the breach. It cannot reasonably be said, then, that those nurses who failed to apply for jobs that were offered are now disentitled from any remedy because they didn't so apply. Whether a nurse applied then or not is of little assistance. The question is whether a St. Mary's obstetrics or paediatrics nurse (at the time) can now establish she would have applied, qualified for, and accepted a position had the job opportunities been properly offered.

35. What about nurses at St. Mary's who would not be within this group (those entitled to one of the 74 positions who also would have accepted it) but whom O.N.A. asserts suffered damages because some of the 74 nurses who should have had rights to go to Kitchener-Waterloo, and who would have gone, remained at St. Mary's? Some nurses only stayed at St. Mary's because they were not offered the proper terms and conditions at Kitchener-Waterloo, asserts O.N.A. In turn, these nurses bumped other St. Mary's nurses, because they filled other jobs at St. Mary's. Had they gone to Kitchener-Waterloo, O.N.A. argues, someone else at St. Mary's could have filled the job. O.N.A. argues therefore, that some nurses at St. Mary's suffered consequential damages because they were bumped out of or squeezed out of their current jobs at St. Mary's by those who did not, wrongly, have and exercise the opportunity to go to Kitchener-Waterloo, or they lost out on other jobs that went to St. Mary's nurses who would have gone to Kitchener-Waterloo, but for that Hospital's breach of the Act, and wrongful refusal to apply the collective agreement.

36. Since the collective agreement didn't apply, no damages flow from the failure of the Hospital to apply it. However, to the extent that O.N.A. can prove that the losses, if any, suffered

by a nurse, are directly attributable to the breach by Kitchener-Waterloo of section 67 of the Act, as found above, then those nurses may be entitled to damages, subject again to the principles of mitigation. The Board also has some concerns about remoteness and foreseeability with respect to any damages on such grounds. As noted, the transfer of obstetrics and paediatrics to Kitchener-Waterloo was part of an overall rationalization where services also were redirected or transferred to St. Mary's with resultant increases in positions in some services at St. Mary's. And under the rationalization Plan, the total budgets of the two institutions did not change. The overall financial position for St. Mary's was deteriorating, and St. Mary's was otherwise in a position where it needed to reduce its costs. In these circumstances, O.N.A. may have difficulty in establishing that a particular nurse suffered the losses claimed directly because of Kitchener-Waterloo's wrongful behaviour. O.N.A. is however, to have an opportunity to seek to prove entitlement to such damages.

37. The Hospital asserts that if any St. Mary's nurses are to be "reinstated" to Kitchener-Waterloo Hospital then it is only fair that any nurses at Kitchener-Waterloo that will be supplanted because of such reinstatement ought in turn to be transferred over to St. Mary's or offered "reinstatement" at St. Mary's. Such an order would not be appropriate. All incumbents in the 74 positions are at risk, not only those originally from Kitchener-Waterloo. More importantly, Kitchener-Waterloo Hospital did not seek this remedy when the case commenced (now several years ago). It is now too late to raise this novel remedial request.

38. Ordinarily, the Board would at this stage remit (again) to the parties the question of the appropriate remedial relief, in light of our comments and findings above, and we would remain seized with respect to such matters. However, given the demonstrated inability of the parties to agree on any matter, and the slow pace of this litigation when left to the parties (as evidenced by the nine month delay between our original decision and the request to relist the matter to deal with remedial relief), it does not appear in the interest of any of the parties, nor of the nurses at either institution, that this matter continue according to the parties' timetable.

39. The potential liability continues to increase as time passes, and the ultimate cost to all the parties, particularly the nurses involved who might be affected by any of the remedies, continues to mount. There is no question that all interested parties will be better served by O.N.A. and Kitchener-Waterloo Hospital resolving the remaining matters themselves. Any decision the Board might issue will cause further delay in reaching a final resolution, and will necessarily be less sensitive to the realities of the workplace and all the nurses involved, and will no doubt be considerably more expensive, in terms of increased litigation and delay costs, to both parties. We urge the parties to make serious efforts to try to resolve the remaining remedial aspects. To this end, Alternate Chair Rick MacDowell is hereby appointed to meet with the parties and assist them in resolving the outstanding issues. This matter will not be relisted to deal with the remaining remedial matters until we are in receipt of a report from Mr. MacDowell advising that the matter be relisted. If this should be necessary, continuation dates shall be set without consultation, but sufficiently in advance that counsel can make arrangements to attend or to instruct other counsel. Further, we may again direct extensive written pleadings prior to recommencing litigation.

40. The Board remains seized on the basis described above.

2912-92-M United Food & Commercial Workers International Union, Local 175/633, Applicant v. 810048 Ontario Limited c.o.b. as Loeb Highland, Responding Party

Discharge - Discharge for Union Activity - Evidence - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union *animus* and claiming that discharge motivated by employee having lied to management about theft committed by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and declarations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

BEFORE: *Judith McCormack*, Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

APPEARANCES: *Kelvin Kucey*, *Rick Wauhkonen*, *Mike Duden* and *Tom Stuart* for the applicant; *George Rontiris*, *Jamie Wilkinson* and *Harry McGhie* for the responding party.

DECISION OF JUDITH McCORMACK, CHAIR, AND BOARD MEMBER D. A. PATTERSON:
March 12, 1993

1. The name of the responding company is amended to read: "810048 Ontario Limited c.o.b. as Loeb Highland".
2. This is an application under section 92.1 of the *Labour Relations Act* for an interim order relating to Board File No. 2911-92-U. That file involves a complaint under section 91 of the Act, alleging that John Quessy was discharged in violation of the *Labour Relations Act*. By way of an interim order, the applicant requests that Mr. Quessy be reinstated to his position as a produce clerk at the responding company's store, and granted compensation for the period of his discharge.
3. Because this is the first case the Board has decided under the provisions of section 92.1, we find it useful to set out the procedure involved. This application was filed on Monday, January 11, 1993 after the applicant had delivered a copy of the application, the complaint under section 91 and a copy of the response form to the responding company in accordance with Rule 88. The responding company filed its response on January 13, 1993, after delivering a copy of it to the applicant in accordance with Rule 89. As part of their filings, both parties submitted declarations in regard to their respective evidence, and written representations in support of their positions. In addition to this material, the Board decided to hear oral arguments, and a hearing was scheduled for Thursday, January 14, 1993.
4. At the beginning of that day, the parties indicated to the Board that they wished to discuss settlement with each other. We then obtained estimates from counsel with respect to the length of their arguments. The purpose of this was to provide us with some means to assess at what point the settlement discussions might have an impact on our ability to hold an expeditious hear-

ing. As it turned out, negotiations broke down between the parties and the Board commenced hearing their arguments at 11:00 a.m.

5. At the conclusion of the parties' oral arguments, we reserved our decision but advised the counsel that we would attempt to issue it as soon as possible, keeping in mind the inherent urgency of this kind of matter. On Monday, January 18, 1993, the Board issued the following unanimous decision:

The Board directs that the Responding Party reinstate John Quessy forthwith to his former position pending the final disposition of the matter in Board File 2911-92-U. The applicant's request for interim compensation is denied. Our reasons will follow.

6. Before turning to those reasons, we find it useful to comment on two other procedural matters. As we noted earlier, the applicant and the responding company filed a number of declarations containing the evidence that they wished to submit with respect to the interim order application. However, both sets of declarations included a substantial degree of hearsay. Rules 86 and 89 provide as follows:

86. An application for an interim order under section 92.1 of the Act must include:

- (a) one or more declarations signed by persons with first-hand knowledge, detailing all of the facts upon which the applicant relies, including what harm, if any, will occur if the interim order is not granted. Each signed declaration must include the following statement: "This declaration has been prepared by me or under my instruction and I hereby confirm its accuracy"; and
- (b) complete written representations in support of the applicant's position.

* * *

89. A responding party must file a response to the application not later than two (2) days after the application was delivered. A completed response must also include:

- (a) one or more declarations signed by persons with first-hand knowledge, detailing all of the facts upon which the responding party relies, including what harm, if any, will occur if the interim order is granted. Each signed declaration must include the following statement: "This declaration has been prepared by me or under my instruction and I hereby confirm its accuracy"; and
- (b) complete written representations in support of its position.

7. These rules make it clear that the accuracy of the declarations which the parties file must be confirmed by persons having first-hand knowledge of the facts. While the Board has the power under Rule 22 to relieve against their strict application, no compelling reasons were advanced in this case as to why we should allow hearsay material, and as a result, we were not prepared to rely on it. To the extent that it was necessary to rely on the declarations in this matter, we have used only those facts that were either first-hand, or not in dispute between the parties.

8. Counsel for the union also made a number of factual assertions in his argument that were not contained in the application. Rule 20 provides as follows:

20. No person will be allowed to present evidence or make any representations at any hearing about any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission

of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.

9. The company's counsel objected to the union's assertions, and the Board reserved its decision at that time. Having considered the matter, we are not inclined to grant permission to allow such factual assertions to be admitted. Among other things, we observe that these assertions were hearsay as well, and the responding company had no opportunity to address them in its material. Although it was suggested by the union that the facts in question had occurred since the date of Mr. Quessy's discharge on January 5, 1993, it was not at all clear that the facts involved a period of time subsequent to the date on which the application was filed. In the absence of more persuasive representations in this regard, we are not prepared to allow the union to rely on those assertions.

10. Turning now to the substance of this matter, the applicant union alleges in its material that the responding company violated sections 65, 67, 71, 81 and 82 of the *Labour Relations Act* by discharging John Quessy, who was actively involved in the union's organizing drive at the company's grocery store. This allegation is in part the subject of the section 91 complaint in Board File 2911-92-U. As a result of the applicant's request for expedition under section 92.2 with respect to that complaint, it was scheduled to be heard on January 26, 1993, and in accordance with section 92.2(3), will be heard on consecutive days from Monday to Thursday until it is completed. The effect is that this request for interim relief is likely to involve a relatively short period of time.

11. The parties agreed that the applicant had been certified as the bargaining agent for full-time employees in the meat department on July 13, 1992, and the applicant then apparently commenced an organizing drive with respect to other employees. There was no dispute that Mr. Quessy had been employed by the company since November of 1990, and was considered a good employee in the grocery department. The union asserts that he was one of several employee organizers in the store, and that he had recruited some twenty other employees to membership in the union. During December of 1992, the store owner, Jamie Wilkinson, and the store manager, Duanne Dumesnil, became aware of the union's new organizing drive, and questioned Mr. Quessy and another employee in this regard. The company asserts that Mr. Quessy was told in this conversation not to solicit signatures for the campaign during working hours. The parties also agree that Mr. Wilkinson asked Mr. Quessy why he believed that a union was needed at the store, to which he responded by making a reference to better wages. The union then alleges that Mr. Wilkinson said that he would not hesitate to close the store if the union got in, an allegation which is emphatically denied by the company.

12. The parties do not dispute that in early January, another employee stole a can of soda pop. It also appears to be common ground that Mr. Quessy lied to a company official to cover up this theft. The union is of the view that company officials conducted themselves so as to elicit this lie or to entrap Mr. Quessy; the company characterizes Mr. Quessy's conduct as fraudulently corroborating the other employee's version of the theft, and asserts that he was therefore implicated in it. The company also states that it has published rules prohibiting theft which provide for immediate dismissal. Both the other employee and Mr. Quessy were discharged on January 5, 1993. It is in these circumstances that the union requests that Mr. Quessy be reinstated pending the disposition of the section 91 complaint.

13. Section 92.1(1) of the *Labour Relations Act* confers explicit jurisdiction on the Board to make interim orders:

92.1- (1) On application in a pending or intended proceeding, the Board may grant such interim

orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

14. The authority granted under section 92.2(1) is very broad, and there is no language which imposes qualifying conditions upon the Board's jurisdiction under this provision. Such extensive discretion is consistent with the Board's function as an expert tribunal on labour relations matters. It seems apparent that the Legislature was prepared to rely heavily on the Board's accumulated labour relations wisdom in determining what circumstances should attract an interim order. This is not surprising, since interim relief in labour relations matters may involve unique considerations based on a very specific social and economic landscape. In fact, it is fair to say that the interim relief jurisprudence from other provincial labour relations boards abounds with references to distinctive features of labour relations.

15. In terms of that jurisprudence, the parties presented us with the following cases, which include some from the Courts as well: *Sobey's Inc. v. United Food and Commercial Workers' International Union, Local 1000A*, (December 22, 1992 - unreported) [now reported at [1992] OLRB Rep. Dec. 1237] (Ontario Court of Justice (Divisional Court)) [since set aside February 9, 1993]; *Re Joan Harper and Arlene Cook and Board of School Trustees of School District No. 39 (Vancouver) and Vancouver Teachers' Federation*, [1989] BCIRCD C79 (April 5, 1989) (British Columbia Industrial Relations Council); *Re White Spot Restaurants Ltd. and Food and Service Workers Local No. 112 of Canadian Association of Industrial Mechanical and Allied Workers*, [1988] BCIRCD C274 (October 14, 1988) (British Columbia Industrial Relations Council); *Re United Food and Commercial Workers International Union Local 280-P Canada Labour Relations Board et al.*, [1984] CLLC ¶14,069, (S.C.C.); *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 80 D.L.R. (3d) 725 (Ontario Court of Justice (Divisional Court)); *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504.

16. In addition, the parties also invited us to examine the jurisprudence of other provincial labour boards, particularly that of Manitoba and Saskatchewan, and we reviewed the following cases as a result: *British Columbia Transit and Transit Management Association*, [1988] BCIRCD C317 (December 30, 1988) (British Columbia Industrial Relations Council); *Western Canada Steel Limited et al. and Canadian Association of Industrial, Mechanical and Allied Workers, Local 6*, (1989) 6 C.L.R.B.R. (2d) 123 (British Columbia Industrial Relations Council); *James R. Kennedy and Sheet Metal Workers' International Association, Local Union No. 280*, [1991] BCIRCD C46 (February 28, 1991) (British Columbia Industrial Relations Council); *Justin Wasilifsky and Nancy Wasilifsky and North Vancouver Teachers Federation et al.*, [1988] BCIRCD C144 (June 30, 1989) (British Columbia Industrial Relations Council); *Health Labour Relations Association and Hospital Employees Union et al.*, [1992] BCIRCD C43 (March 9, 1992) (British Columbia Industrial Relations Council); *Fast Car Co. Inc. and New World Television Productions Co. Inc. et al.*, [1991] BCIRCD C146 (July 23, 1991) (British Columbia Industrial Relations Council); *Miscellaneous Teamsters, Local 987 and Alberta Brotherhood of Dairy Employees and Driver Salesman and Northern Alberta Dairy Pool Ltd.*, [1991] Alta.L.R.B.R. 159 (Alberta Labour Relations Board); *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Macdonalds Consolidated, Regina, Saskatchewan* [1991] 4:1 SaskLRB 45 (April 19, 1991) (Saskatchewan Labour Relations Board); *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Watergroup Companies Inc.*, [1992] 4:4 SaskLRB 68, (March 4, 1992) (Saskatchewan Labour Relations Board); *The Canadian Association of Policemen, Moose Jaw Branch and Board of Police Commissioners of the City of Moose Jaw*, [1992] 4:4 SaskLRB 88 (March 13, 1992) (Saskatchewan Labour Relations Board); *United Food and Commercial Workers, Local 1400 v. F. W. Woolworth Co. Limited* (June 3, 1992), Doc. No. 142-92 (Saskatchewan Labour Relations Board); *Service Employees Union, Local 336 and Wolf Willow Lodge et al.* (June 26, 1992), Doc. No. 155-92 (Sas-

katchewan Labour Relations Board); *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Watergroup Canada Limited et al. (#2)*, [1992] 5:2 SaskLRB 121 (August 25, 1992) (Saskatchewan Labour Relations Board).

17. In determining whether interim relief should be granted, other boards have considered such distinctive labour relations issues as whether there is a critical labour relations purpose (*White Spot Restaurants, supra*), the potential loss of membership support to a union (*British Columbia Transit, supra*), the impact of delay in labour relations and the fact that labour relations parties have to co-exist after the litigation, *Northern Alberta Dairy Pool Ltd., supra*), and the purposes of the various applicable labour relations statutes (*White Spot Restaurants, supra*; *Macdonalds Consolidated, Regina, Saskatchewan, supra*; *Watergroup Companies Inc., supra*). Indeed, in *British Columbia Transit, supra*, the British Columbia Industrial Relations Council distinguished a British Columbia Supreme Court decision on the basis that it was so far removed from the labour relations context, and observed that while common law principles surrounding interim relief can offer useful guidelines, they do not take into account labour relations concerns such as loss of membership support.

18. In other words, it is incumbent upon the Board to develop a sound and indigenous jurisprudence in regard to interim orders which reflects the complex and unique realities of labour relations. While we echo the views of the British Columbia Industrial Relations Council to the effect that common law principles may provide us with some useful insight, if we were to import in a wholesale or unreflective manner the kinds of tests applied by Courts in considering interim and interlocutory relief, we would be failing in our responsibility as an expert tribunal to develop a jurisprudence attuned to the distinctive features of labour relations in this province. This latter point, that our jurisprudence should reflect the realities of Ontario labour relations in particular, is also important. While we have found much that is instructive in the cases we have reviewed from other provinces, we also feel constrained to note a number of differences in the legislative or other authority which gives rise to their interim powers, in the purposes of their respective labour relations statutes and in the history and climate of their labour relations. Again, an uncritical adoption of any one of the various approaches in these cases would not serve the Ontario labour relations community well.

19. With this in mind, we turn first to the company's argument that the Board's interim relief power should be used only in rare and exceptional circumstances. We do not find this a particularly useful approach. Section 92.1(1) contains no hint that it should be reserved to extraordinary cases; indeed, unlike some corollary provisions which contain threshold tests, the Ontario provision is available in every proceeding before the Board. This is not to say that the prospect of a flood of interim relief applications does not cause us some concern. However, we think it more appropriate to start from the position of attempting to elucidate a fair and intelligent labour relations test for section 92.1(1). Those cases that meet that test should then attract interim relief, regardless of how many or how few they may be.

20. In considering the dimensions of such a test, we note that the cases from other provinces reveal an assortment of approaches and considerations in addressing interim order requests. However, there are a number of common themes running through them which may be summarized in the following manner. Most refer to some kind of threshold test in regard to the merits of the main application with reference to which interim relief is sought. Some require that a case not be frivolous or vexatious, a requirement which has also been described as the equivalent of whether there is a serious issue to be tried. Other cases have referred to whether there is an arguable case of breach, or the possibility of a legitimate claim, and a number require that there be a *prima facie* case, or that there be a strong *prima facie* case. Secondly, most cases involve a review of the harm

which might befall the applicant if the interim order is not granted, and whether that harm is irreparable. Finally, the cases refer to the balance of convenience between the parties.

21. Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgment of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, section 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.

22. This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.

23. Our practical concern that the Board's decisions on interim relief be insulated to some extent from the merits of the main application is reinforced by the language of section 92.1(1), which provides that an interim order can be obtained in an intended proceeding as well as in one already filed. If an interim order is available even before the main proceeding has been commenced, it suggests that interim relief is less dependent upon the main application than one might otherwise think.

24. Moreover, a number of the provisions of the *Labour Relations Act*, including some of those which the applicant alleges were breached in the complaint in this matter, are subject to a reverse onus where a responding party must establish that it did not violate the Act. The effect is to complicate an assessment of the merits, including the issue of what would constitute a *prima facie* case in these circumstances. In addition, the interim order power contained in section 92.1 applies to an extensive package of legislative amendments, many of which involve new or reshaped jurisdiction for the Board. This means that it may be difficult to evaluate the strength of the merits of any particular case, at least until the Board has had an opportunity to develop case law in these new areas. Lastly, even where the Board can rely on well-established jurisprudence, there must be some allowance for novel arguments to be presented to it from time to time. While no tribunal encourages frivolous applications, it is also true that the Board must be responsive to changes in labour relations if its jurisprudence is to remain vital and relevant.

25. At the same time, it is clearly essential that there be some connection between interim relief and the merits of the main application. Common sense suggests that an interim order is inherently subordinate to the main application, a proposition which is given added cogency in this context by Rule 88. That rule makes it clear that a copy of the main application must be filed along with the request for an interim order, which to some extent offsets our view of the effect of section 92.1 in intended proceedings. Isolating the interim application by the absence of any requirement

with respect to the strength of the main application might also carry with it the possibility of abuse, and might strand the Board in a situation where grounds for an interim order might be made out but the main application was entirely and obviously without any merit whatsoever.

26. With this in mind, we find it most appropriate to set out as one requirement in a test for interim relief that the main application must reflect an arguable case. By this we mean that if the applicant's assertions can be established, there is at least an arguable breach of the Act, or an arguable case for a remedy within the parameters of some provision of the Act. While leaving room for some innovation by parties, such a test protects the integrity of the Board's processes by precluding interim relief where the main application is frivolous or vexatious. This provides the Board with an element of security and some coherence between the main application and the interim relief power, but gives recognition to our other concerns described above.

27. We also find it more appropriate to consider this requirement as simply one ingredient in a test for interim relief, rather than an initial threshold of some kind. Setting up an assessment of the merits as a preliminary hurdle in an interim relief test suggests a two-step analysis which we find unnecessarily formal in the circumstances.

28. Returning to the themes reflected in the interim order cases from other provincial boards, the next issue is the concept of irreparable harm. This formulation is not as useful to us as it might first appear. In the first place, a review of the cases suggest that it is a rather elastic concept, which is often interpreted differently from one case to another. Secondly, the experience of this Board is not that there are two distinct categories involving cases on the one hand where entirely adequate remedies can be applied, and those on the other where the available remedies are clearly deficient. Rather, it is a more accurate reflection of the Board's experience to say that most remedies cannot cure every aspect of the harm which may flow from a breach of the Act, and that at best, the Board attempts to provide some rough approximation. Labour relations matters often involve a cluster of intangible and fluid social relations which may be extraordinarily time-sensitive. Once these relations are ruptured, they are not easily restored through the sometimes clumsy operation of subsequent remedies. Indeed, it goes without saying that remedies are, by their very nature, a substitute for what should have happened.

29. At the same time, when creatively exercised, the Board's wide remedial powers under section 91, for example, can often go a considerable distance toward repairing the mischief caused by violations of the Act. Any consideration of interim relief should also take into account the Board's experience in developing remedial orders which speak specifically to labour relations problems. Moreover, we recognize that the imposition of relief before an adjudication on the merits is inherently problematic to some extent.

30. In this context, we find it more useful to acknowledge that in terms of our ability to address harm through remedies available at the disposition of the main application, what we are really dealing with is degrees of adequacy on a continuum of damage. Attempting to force this reality into mutually exclusive legal pigeon holes such as irreparable damage as opposed to, say, repairable damage, is more artificial than we need to be, and does not reflect the Board's practical experience.

31. If the concept of irreparable harm does not shed as much light as we would like on the test for an interim order, there is no doubt that some analysis of harm is still central. In considering the shape of that analysis, it is useful to return to the Board's own jurisprudence which emphasizes the importance of effective remedies as a critical component of the scheme of the *Labour Relations Act*. As the Board said in *Radio Shack*, [1979] OLRB Rep. Dec. 1220:

It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable; they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation.

32. Moreover, both the Board and the Courts have long recognized that delay poses special problems in labour relations matters. In *Consolidated-Bathurst Packaging Ltd. v. I.W.C., Local 2-69* (1984) 2 O.A.C. 277, the Court noted:

... there is a fundamental principle of labour law that injustice and detriment to the labour relations of an employer and employee will result if the process is delayed. In my opinion, it is fair to say that the thrust of jurisprudence not only in the Board but in the courts may be summarized by saying:

In the law which has grown up around labour relations in this province and indeed elsewhere where the common law is pursued, the overriding principal invariably applied is that labour relations delayed are labour relations defeated and denied: *The Journal Publishing Company of Ottawa Ltd. v. The Ottawa Newspaper Guild*, Ont. C.A. released May 17/77 (unreported) [since reported [1977] 1 A.C.W.S. 817 (Ont. C.A.)].

Similarly, in *Re United Headwear and Biltmore/Stetson (Canada) Inc.* (1983), 41 O.R. (2d) 287, the Court commented that delay in labour relations matters often works unfairness and hardship. To some extent then, the Board must ensure that delay does not in itself decide a case.

33. The importance of effective remedies, their general imperfection in labour relations, and the corrosive effects of delay all serve to highlight the critical role interim relief has to play in this area. If harm is not easily cured after the fact, and if delay is critical, it makes some sense to emphasize preventing that harm at the earliest possible point. However, it must be recognized that preventing one harm, to a union applicant for example, may well have a harmful labour relations effect on a responding employer. This suggests that a general predisposition towards preventing harm, rather than curing it, applies to the interests of both parties. In other words, the Board must balance the harm to each party in considering whether to grant an interim order. As a result, rather than separating out the concept of irreparable harm which appears to be a poor fit with the Board's experience in remedial matters, and then proceeding to an examination of the balance of convenience, we find it more consonant with labour relations realities to adopt an approach where we consider both what harm may occur if an interim order is not granted, and what harm may occur if it is. This does not mean that the notion of irreparable harm is entirely irrelevant. It merely reduces it to one of a number of aspects of harm which the Board might consider in this area.

34. Of course, this leaves open to some extent the sort of harm we envision as relevant to this balancing process. Given the fact that this jurisprudence is in its infancy, it makes sense to allow the parameters of that harm to evolve in the context of concrete situations which will be presented to us. Suffice it to say at this point that balancing the harm to the parties is not an exercise which takes place in a vacuum, but rather in the context of the purposes and scheme of the Act, which also serve to provide definition for the type of harm we would find persuasive. It is also worth noting that the Board has more flexibility in crafting interim orders than it may in final remedies. Because they are temporary, and because they are not dependent on a finding of a violation,

for example, the Board has the relative luxury to conceive of interim justice as an endeavour in problem-solving, rather than fault-finding.

35. This brings us to the facts before us. We observe firstly that there is little doubt that there is an arguable breach of the Act on the face of the section 91 complaint. The complaint alleges that a union organizer was fired by the company as a reprisal for his union activities, to interfere with those activities and to influence other employees against joining the union. If these allegations were proven, they would amount to violations of sections 65, 67 and 71 of the *Labour Relations Act* which provide as follows:

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

* * *

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

* * *

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

The respective declarations filed by the parties leave no doubt that there is a dispute between the company and the union in this regard. In this sense, the main application satisfies this aspect of the interim order test.

36. Moving on to the specific balance of harm in this case, the Board has frequently recorded the chilling effects of a discharge of a union organizer on an organizing campaign. For example, in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, the Board said as follows:

However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant "chilling effect" on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The

mere reinstatement of the employee directly affected, with back-pay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist of those occasions where he will not.

37. Moreover, the Board has found on quite a number of occasions that the discharge of a union organizer during a union campaign may lead to a situation where the true wishes of employees can no longer be ascertained, despite the Board's ability to reinstate the organizer. In other words, the intimidatory effect is so powerful that employees can no longer express their real views on unionization, with the result that certification is granted without a test of employee wishes. For example, in *DI-AL Construction Limited*, [1983] OLRB Rep. Mar. 356, the Board said in this regard:

A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made clear to employees the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote.

38. Similarly, in *Zenith Wood Turners Inc.*, [1987] OLRB Rep. Nov. 1443, the Board was faced with a situation where a company had laid off a number of employees during an organizing campaign in violation of the *Labour Relations Act*. In this case, however, the company recalled the employees shortly thereafter and issued a letter indicating that employees were free to choose union representation or not. The Board found that the damage had already been done, despite the recall and letter, and that employees were no longer able to express their true wishes with respect to union representation. The Board came to a similar conclusion in *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564, despite the reinstatement of an employee laid off in violation of the Act, although there were other factors which resulted in that finding as well.

39. Why is the impact so severe when a union organizer is discharged? The Board has previously commented on the peculiar vulnerability of employees who depend on the employer for their livelihood. In *Pigott Motors (1961) Ltd.* (1962), 63 CLLC ¶16,264, the Board said:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

In *Roytec Vinyl Co.*, [1990] OLRB Rep. June 727, the Board commented on this problem in another context:

In the Board's experience, employees are often concerned that they may be subject to such reprisals by their employer for union activity. The Board's jurisprudence is replete with examples of employees who were discharged or penalized in some way, at least in part, because of their support for unionization. For an employee who fears that joining a union will lead to a discharge or other penalty, the result he or she contemplates can be a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or

social standing, the uncertainty of finding another job and the possibility of a slide onto social benefits. Of course, in most cases such a bleak picture will not come to pass; nevertheless, the mere possibility of any of these consequences may exert a powerful influence on an employee contemplating collective bargaining, a regime frequently not welcomed by employers.

For similar reasons, a discharge has been referred to in arbitral jurisprudence as the “capital punishment” of labour relations.

40. The combination of the economic vulnerability of employees and their assumption that an employer does not welcome a union means that a union organizing drive is a relatively fragile enterprise in which momentum is often critical. Where a campaign is disrupted by an unlawful discharge, the Board’s jurisprudence under section 9.2 of the Act reflects the fact that such momentum cannot easily be restored by the reinstatement of an employee at some point farther down the road.

41. This raises the question of whether even interim reinstatement can prevent this kind of harm. We have no illusions that the powerful effect of a discharge in these circumstances can be entirely counteracted by earlier measures. Nonetheless, common sense suggests that early reinstatement can at least help to minimize some of the potential harm to an organizing campaign.

42. Counsel for the company argued that section 9.2 of the *Labour Relations Act* provided the cure for any damage done to the union’s campaign, and that as a result, no interim order was necessary. There is no doubt that the existence of section 9.2 provides a potent remedy in certain kinds of cases:

9.2 If the Board considers that the true wishes of the employees of an employer or of a member of an employers’ organization respecting representation by a trade union are not likely to be ascertained because the employer, employers’ organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

Of course, for the reasons set out above, our interim order test is more dependent upon balancing the harm to the parties, and minimizing that harm at an early stage, than it is on the difficult exercise of speculating on the relative adequacy of various remedies. This means that we find it preferable to emphasize protecting, at least to some extent, the ability of employees to freely express their wishes on unionization, rather than relying at this point on a subsequent remedy based on that ability having been impaired. We also note, however, that section 9.2 is not available in the section 91 complaint to which this application relates. Rather, it will only be available if an application for certification is eventually filed, if the employer is found to have contravened the Act, and if such contravention results in a situation where the true wishes of employees are not likely to be ascertained. Moreover, all section 9.2 provides is certification, leaving open the question of whether the potential undermining of union support may have a broader or long-lasting effect, whether or not an application for certification is ever filed. As a result, while acknowledging the utility of section 9.2, we do not find it provides us with much comfort in the circumstances of this case.

43. We conclude, then, that the potential harm of not granting the interim order is significant. This brings us to a consideration of the harm that may result from granting the order. Interim reinstatement of Mr. Quessy will mean that the company must continue to employ an individual who admittedly lied to company officials, and lied to them about a theft. We recognize that any theft is of considerable concern to an employer, and, the company asserts, in this particular industry. There is no doubt that this is an unpalatable and difficult prospect for the company, and that

reinstatement in these circumstances may have at least some temporary negative effect on the managerial authority of the company, and perhaps in particular, on its policy with regard to theft.

44. However, we observe that any interim reinstatement order will only be in effect until the disposition of the main application, which is scheduled to start less than two weeks hence. It also seems unlikely that the discharge offence will be repeated within such a short period of time. In these circumstances, the potential harm to the company is minimized. Of course, this fact minimizes the harm to the applicant as well. On the other hand, having regard to the critical momentum of an organizing campaign and the corrosive effects of delay, even a number of days may make a substantial difference in amplifying the chilling effect of the discharge of a union supporter. On balance, we find that the harm from granting the order is less than the harm which may flow from not granting it. Having regard both to our conclusion in this respect and our finding that the section 91 complaint reflects an arguable breach, we conclude that an interim order reinstating Mr. Quessy is appropriate.

45. However, we decline to award interim compensation for the period between Mr. Quessy's discharge and his interim reinstatement. While we accept that Mr. Quessy's financial loss may also have a chilling effect, if compensation is ultimately determined to be appropriate the delay in its provision exacts a relatively minor toll, given how quickly Mr. Quessy has been reinstated and the early scheduling of the section 91 complaint. This is particularly true in a context where the Board usually awards interest where it finds compensation is payable. In contrast, the difficulty of the company attempting to retrieve any amount paid if the Board ultimately finds that it did not violate the Act is considerable. Again, in considering the balance of harm with respect to this matter, it appears to us that compensation is more appropriately dealt with by the Board panel addressing the merits of the section 91 complaint.

46. Our colleague's concurring opinion will follow shortly.

[The concurring decision of Board Member Ronson dated April 23, 1993 will be reported in [1993] OLRB Rep. April: Editor]

2911-92-U United Food & Commercial Workers International Union, Local 175/633, Applicant v. 810048 Ontario Ltd. c.o.b. as Loeb IGA Highland, Responding Party

Discharge - Discharge for Union Activity - Evidence - Practice and Procedure - Unfair Labour Practice - Employer claiming that employee discharged for having lied to management about theft committed by another employee - Union objecting to introduction of evidence about "similar incident" involving other employee on ground that it pertained to material fact which had not been set out in employer's response - Board relying on Rule 20 of Board's Rules of Procedure to uphold objection - Discharge tainted by anti-union *animus* - Board finding that employer violated the Act when it met with employee to discuss his organizing activities and when the employee was discharged - Reinstatement with compensation ordered

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

APPEARANCES: *Kelvin Kucey*, *Rick Wauhkonen*, *Tom Stuart*, *John Quessy* and *Mike Duden* for the applicant; *Stephen Bird*, *Jamie Wilkinson* and *Harry McGhie* for the responding party.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER E. G. THEOBALD;
 March 11, 1993

1. In a decision dated February 1, 1993 regarding this complaint under section 91 of the *Labour Relations Act*, the majority of this panel of the Board wrote as follows:

1. This is an application under section 91 of the *Labour Relations Act*.

2. For reasons which will be provided at a later date, the majority of this panel of the Board, with Board Member Wightman dissenting, have determined that the responding party contravened the Act when its owner and one of its managers met with John Quessy in December of 1992 to discuss his union organizing activities, and when Mr. Quessy was discharged on January 5, 1993.

3. To remedy those contraventions of the Act, the responding party is hereby ordered to:

- (1) cease and desist from contravening the *Labour Relations Act*;
- (2) maintain the reinstatement of John Quessy directed by another panel of the Board in an interim order made on January 18, 1993 (in File No. 2912-92-M);
- (3) compensate Mr. Quessy for all lost earnings and benefits resulting from its contraventions of the Act;
- (4) pay interest on that compensation, such interest to be calculated in the manner described in Practice Note No. 13, dated September 8, 1980; and
- (5) post copies of the attached notice marked "Appendix" in conspicuous places on its premises where they are likely to come to the attention of its employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by management to ensure that the notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises shall be given to a representative of the applicant so that the applicant can satisfy itself that the responding party is complying with this posting requirement.

4. The Board will remain seized of this matter in the event that a dispute arises between the parties concerning the implementation or quantification of the Board's order.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted By Order of the Ontario Labour Relations Board

After a hearing in which both the Company (810048 Ontario Ltd. c.o.b. as Loeb IGA Highland) and the Union (United Food & Commercial Workers International Union, Local 175/633) participated, The Ontario Labour Relations Board found that the Company contravened the Ontario Labour Relations Act when its owner and one of its managers met with John Quessy in December of 1992 to discuss his organizing activities, and when Mr. Quessy was discharged in January of 1993. The Company has been ordered to reinstate Mr. Quessy and to compensate him for his lost wages and benefits, with interest. The Company has also been ordered to cease and desist from contravening the *Labour Relations Act*.

The *Labour Relations Act* gives all employees a number of rights including:

The right to organize themselves;

The right to form, join, participate in, and be represented in collective bargaining by the trade union of their choice;

The right to refuse to do any or all of these things.

The Company is prohibited by the *Labour Relations Act* from:

Doing anything which interferes with the rights of employees under the Act.

Doing anything to penalize employees for exercising any of their rights under the Act.

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2. The purpose of this decision is to provide written reasons for that decision.

3. The responding party (also referred to in this decision as the “Company”) operates a retail food store in Cambridge, Ontario. The applicant (also referred to herein as the “Union”) was certified on July 13, 1992 as the bargaining agent for the Company’s full-time meat department employees. In December of 1992, the Union embarked upon a campaign to organize the remainder of the Company’s employees. Rick Wauhkonen was the Union official in charge of co-ordinating the campaign. The chief employee organizers were John Quessy and Tom Stuart. A third employee, Wayne Hammond, also had some involvement in the campaign. Since a number of employees told members of management about the organizing drive in December of 1992, the Company’s managers and its owner/operator, Jamie Wilkinson, quickly became well aware of the organizing activities which were being carried on by Messrs. Quessy, Stuart, and Hammond.

4. Mr. Quessy commenced employment with the Company in November of 1990 as a grocery clerk. He proved to be a good employee and was subsequently given a lateral transfer to the produce department, at his request. Prior to working for the responding party, Mr. Quessy was employed for eight years at a grocery store in Kitchener, where he started as a stock person and worked his way up to the position of grocery manager.

5. By December 19, 1992, Mr. Quessy had signed up about ten of the Company’s unorganized employees as Union members. Most of his organizing activities up to that time were carried out on Company premises during working hours. Mr. Wilkinson was concerned about Mr. Quessy and the other organizers approaching employees when they were supposed to be working. After discussing the matter with the labour relations department of Loeb Inc. (the store’s franchisor), Mr. Wilkinson met separately with each of the organizers.

6. Mr. Wilkinson’s meeting with Mr. Quessy took place on Saturday December 19. When Mr. Quessy was called to Mr. Wilkinson’s office that day, Dwayne Dumesnil, the Company’s Store Manager (for fresh foods) was also in attendance. After indicating that he had heard “through the grapevine” that Mr. Quessy was asking employees to join the Union, Mr. Wilkinson advised him that he would have to confine his organizing activities to times other than his or their working hours. Mr. Wilkinson also asked Mr. Quessy why he thought he needed a union and why he was organizing on behalf of the applicant. Mr. Quessy replied that he and the other employees were mostly concerned about their wage levels, and hoped to obtain higher wages through unionization. Since Mr. Wilkinson had also already heard “through the grapevine” that Union organizers were suggesting that unionization could lead to higher wages, he had contacted a Loeb store in London which had a collective agreement with the Union, to obtain information about the wages that store was paying to its unionized employees. On the basis of that information, Mr. Wilkinson informed Mr. Quessy during the December 19 meeting that his existing rate of pay was fifty cents more than

he would be making in a unionized Loeb store. During the course of that meeting, which lasted for about fifteen minutes, Mr. Wilkinson also stated that the employees in his store would never receive the wage rates that were being paid by Zehr's, Loblaws, and A & P because the store could not afford to pay them. He also indicated that before the store would be put in a position of paying that type of wages, he would be more than willing to take a strike and to close the store.

7. The responding party sought to justify Mr. Wilkinson's comments at that meeting on the basis of the employer's "freedom to express views", under section 65 of the Act. However, that provision also expressly prohibits an employer from using coercion, intimidation, threats, promises, or undue influence, to interfere with the formation, selection, or administration of a trade union. An employer is generally entitled to notify employees that they are not permitted to attempt to persuade other employees during working hours to become (or refrain from becoming or continuing to be) members of a union. This is usually accomplished by means of a notice that is posted or distributed to employees by their employer. It is unnecessary in the circumstances of the present case to determine whether or not such information can also be lawfully conveyed to organizers by meeting with them on an individual basis, because in this case Mr. Wilkinson did not confine his comments to that matter when he met with Mr. Quessy. By asking Mr. Quessy why he thought he needed a union and why he was organizing on behalf of the applicant, Mr. Wilkinson clearly stepped beyond the ambit of employer free speech and entered into the prohibited realm of employer interference and undue influence. Mr. Wilkinson's reference to his willingness to close the store also involved intimidation proscribed by sections 65 and 71 of the Act. See, generally, *GSW Inc.*, [1990] OLRB Rep. May 535; *Ontario Bus Industries*, [1989] OLRB Rep. Nov. 1115; and *Dylex Limited* [1977] OLRB Rep. June 357.

8. Although that meeting initially made Mr. Quessy apprehensive about his involvement in the organizing campaign, after discussing the matter with Mr. Wauhkonen his anxiety was reduced. Mr. Quessy subsequently carried on with his organizing efforts and succeeded in signing up approximately ten more employees in the seventeen-day period between that meeting and his discharge by the Company. Given the active "grapevine" which operates in the store, it may reasonably be inferred that Mr. Wilkinson was aware at the time of Mr. Quessy's discharge that his December discussion with Mr. Quessy had failed to dissuade him from supporting the Union and seeking to unionize the Company's unorganized employees.

9. On Saturday January 2, 1993, Stephanie Coxson, an employee in the Company's prepared foods department, took a 65¢ can of pop from a shelf in the grocery department around 12:15 p.m. and brought it to the lunch room without paying for it, in violation of the Company's "Employee Shopping Rules", which provide, in part, as follows:

Items purchased for consumption or use during working hours, must be paid for immediately after selection and receipt taped to product with a 'Thank You' sticker.

Employees are notified of those rules at the time of hiring and are aware that they may be immediately dismissed for violating them.

10. Ms. Coxson's actions were observed by another employee, who told a member of management what Ms. Coxson had done. That information was then relayed to Ms. Coxson's immediate supervisor, who went to the lunch room and asked all of the employees to produce receipts for their purchases. Ms. Coxson's explanation for her inability to produce a receipt for the can of pop was that she had purchased it from the lunch room pop machine, which does not issue receipts. However, when her supervisor checked the can of pop, it was found to be at room temperature. Ms. Coxson's explanation for this was that she had purchased it from the pop machine at approximately 9:50 a.m. and, with Mr. Quessy's permission, had left it in the produce department until

her lunch break, when she had returned to the produce department to retrieve it and take it back to the lunch room.

11. After her supervisor left the lunchroom, Ms. Coxson approached Mr. Quessy in the produce department and told him that she had been “caught upstairs without a receipt for a can of pop”. After Mr. Quessy stated that it was common practice for people to have a can of pop in the lunch room without a receipt, Ms. Coxson requested him to tell anyone who asked him about it that she had brought the can of pop to the produce department shortly before her shift began at 10:00 a.m. and had retrieved it before she went up for her lunch break. Mr. Quessy agreed to do so.

12. The incident was further investigated that Saturday afternoon by Harry McGhie, the Company’s Store Manager for Grocery and Service. After speaking with the employee who had seen Ms. Coxson take the can of pop from the shelf and bring it to the lunch room without paying for it, Mr. McGhie interviewed Ms. Coxson, who told him that she had purchased the can of pop from the pop machine that morning before the commencement of her shift and then brought it downstairs from the lunch room to the produce department where Mr. Quessy agreed she could leave it until her lunch break. When Mr. McGhie asked her if anyone had seen her purchase it from the pop machine, Ms. Coxson stated that Mr. Quessy had. When she was told that a witness had seen her take the can of pop from the shelf at noon and bring it directly to the lunch room without paying for it and without going to the produce department, Ms. Coxson held to her story. Mr. McGhie then sent her home for the balance of her shift pending further investigation, and arranged for her to come to the store after school on Monday.

13. Mr. McGhie then spoke with Mr. Quessy and asked him if Ms. Coxson had brought a can of pop to the produce department that morning. Mr. Quessy indicated that she had done so just before the start of her shift because she wanted to keep it cold by putting it in the produce cooler. He also stated that Ms. Coxson had retrieved it from the cooler a little after 12:00 p.m. Mr. Quessy repeated that false story on Monday morning when he was interviewed about the matter by Mr. McGhie and Mr. Wilkinson, who had been apprised of the matter when he came to the store that morning. When they asked him if he had seen Ms. Coxson purchase the beverage from the pop machine, Mr. Quessy stated that he had not.

14. Ms. Coxson returned to the store after school on Monday afternoon January 4 and met with Mr. Wilkinson, Mr. McGhie, and her supervisor. During that meeting she initially held to her original story. However, after being further questioned about the matter and the discrepancies which management’s investigation had disclosed, she admitted having taken the can of pop without paying for it. She also told them that after being caught without a receipt, she had gone to Mr. Quessy and requested him to corroborate her story about where the can of pop had been on Saturday morning. Ms. Coxson then elected to resign, and signed the following inculpatory resignation:

I Stephanie Coxson quit because I took a can of pop without paying for it.

15. Following discussions with Mr. McGhie, other members of management, and Loeb Inc.’s labour relations department, Mr. Wilkinson decided to discharge Mr. Quessy. Before doing so, he met with him on Tuesday January 5 in the presence of other members of management to go over his version of the story again. After Mr. Quessy had reiterated what he had previously said about the whereabouts of the can of pop on the morning in question, Mr. Wilkinson informed him that an eye witness had seen Ms. Coxson take the can of pop, and that Ms. Coxson had subsequently admitted to having done so without paying for it. He then told Mr. Quessy that this was a very serious situation, and asked if he wanted to have another employee in attendance at the meeting with him. After Mr. Quessy declined that offer, Mr. Wilkinson asked him if he wanted to

recant from his story. Mr. Quessy then did so, admitting that he had agreed to Ms. Coxson's request that he corroborate her story about the can of pop having been left in the produce department on Saturday morning. Although Mr. Quessy knew that management suspected Ms. Coxson of having stolen the can of pop, he did not personally know whether she had paid for it or not until management advised him at that meeting that she had confessed to having taken it without paying for it.

16. The reasons which the Company gave Mr. Quessy for discharging him are set forth as follows in the "ACTION TAKEN" portion of its "CONFIRMATION OF VERBAL/WRITTEN DISCUSSION":

AS JOHN HAS CONSPIRED WITH ANOTHER EMPLOYEE TO STEAL STORE MERCHANDISE, JOHN QUESSY IS NO LONGER A TRUSTWORTHY EMPLOYEE. JOHN'S SERVICES ARE BEING TERMINATED IMMEDIATELY.

17. During his examination in chief of Mr. McGhie, who was the Company's first witness at the hearing of this matter, Company counsel sought to elicit testimony about a "similar incident" in which the Company had fired another good employee approximately nine months earlier. Union counsel objected to the introduction of that evidence on the grounds that it pertained to a material fact which had not been set out in the Company's response. After hearing submissions on that matter and recessing to consider them, the Board made the following unanimous oral ruling:

We are unanimously of the view that the applicant's objection should be upheld and that the responding party should not be permitted to adduce evidence about a previous similar incident, as this is a material fact that was not set out in the response. Rule 20 provides as follows:

No person will be allowed to present evidence or make any representations at any hearing about any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.

Moreover, the essence of that Rule is set forth in the instructions contained in paragraph 5 of the Form A-36 response form which was filed by the responding party. Although the Rule gives the Board a discretion to admit such evidence, we are not persuaded that we should permit the responding party to adduce the evidence in question in the circumstances of this case, as to do so would be prejudicial to the applicant, which is entitled to know in advance of the hearing all of the material facts about which evidence is to be adduced, so that it can investigate those facts, prepare for cross-examination of witnesses, and marshal the evidence which it intends to adduce. Therefore, the objection is upheld.

During the course of these proceedings, the Board made a number of other similar rulings on the basis of that rationale, including one which precluded the applicant from adducing evidence concerning an unpleaded event which, according to Tom Stuart (who was the Union's second witness in these proceedings), had occurred during the organizing drive which preceded the certification of the Company's full-time meat department employees. In accordance with that ruling, the Board has not taken that event into account in deciding this application.

18. It is well established in the Board's jurisprudence under what is now section 91 [formerly section 89] of the *Labour Relations Act* that a discharge will constitute an unfair labour practice if it is motivated in whole or in part by anti-union considerations. See, for example, *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, in which the Board wrote, in part, as follows (at paragraph 4):

... Regardless of the viable non-union reasons which exist, the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive....

See also *Pre Fab Cushioning Products Ltd.*, [1986] OLRB Rep. Feb. 273; *Honest Ed's Limited*, [1985] OLRB Rep. Nov. 1609; and *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745.

19. It is also clear from section 91(5) of the Act that in a complaint of this type, the burden of proof that the employer did not act contrary to the Act lies upon the employer. Having duly considered all of the evidence and the submissions of the parties, we concluded that the employer had not met that burden in the instant case. Although Mr. Quessy would undoubtedly have received at least a very stern warning if not a suspension for foolishly acceding to Ms. Coxson's request that he corroborate her false story concerning the whereabouts of the can of pop with which she was found in the employer's lunch room without proof of purchase, we have concluded that but for his extensive involvement in attempting to unionize the unorganized portions of the Company's work force, Mr. Quessy would not have been terminated by the Company for that misconduct. In reaching this conclusion, we have carefully assessed the credibility of the witnesses who testified before us, and have also taken into account the following factors:

1. Mr. Quessy was by all accounts a good employee who had not previously received any reprimands, warnings, or other discipline during his two years of employment with the Company.
2. The Company's anti-union animus is evident from the aforementioned December 19, 1992 meeting with Mr. Quessy at which the responding party, through Mr. Wilkinson, contravened sections 65 and 71 of the Act in the manner described above. Similar anti-union animus was displayed when Company officials met with Mr. Stuart around that same time to discuss his organizing activities.
3. Mr. Quessy did not steal anything from the store, and did not personally benefit from Ms. Coxson's theft of the 65¢ can of pop.
4. Management was not actually misled at any time by Mr. Quessy's attempts to corroborate Ms. Coxson's story, as they were always of the view that the employee who had observed Ms. Coxson remove the can of pop from the store shelf and take it directly to the lunch room was telling the truth, and that Ms. Coxson's story was a fabrication.
5. Although he inferred from his conversations with members of management that they suspected that Ms. Coxson had not paid for the can of pop, Mr. Quessy did not know whether she had actually done so or not until he was belatedly apprised of her confession.
6. The assertion (contained in the above-quoted confirmation of verbal/written discussion) that Mr. Quessy "conspired with another employee to steal store merchandise" is a highly exaggerated misstatement of what management knew to have actually occurred, and suggests to us that management was not acting in good faith in discharging Mr. Quessy.
7. The harshness of the penalty imposed upon Mr. Quessy in the context described above strongly suggests that the Company seized upon his aberration as a pretext for removing from the work force an

employee whose organizing activities were perceived to be disloyal and potentially harmful to its interests.

20. For the foregoing reasons, the Board concluded that the responding party contravened sections 65, 67, and 71 of the *Labour Relations Act* by discharging Mr. Quessy.

21. Having had the benefit of reading Board Member Wightman's dissent in this matter, we find ourselves to be in respectful disagreement with a number of his observations and conclusions. Without attempting to detail all of the areas of divergence, we note the following:

1. The interpretation which we have placed upon employer freedom of speech in the context of an organizing campaign is fully consistent with the approach which the Board has traditionally applied in that context and does not involve "a more stringent interpretation of free speech provisions".
2. In making our findings in respect of employer interference and undue influence, we duly considered the evidence in chief of the witnesses called by the Union, as well as the evidence they gave during cross-examination and re-examination. We also duly considered all of the evidence adduced by the Company through its witnesses. In this regard we note that paragraph 7 of the dissent is neither a complete nor fully accurate recounting of Mr. Quessy's evidence in chief concerning the December 19 meeting.
3. Our decision does not signal a tolerant attitude towards those who would abet theft, nor does it condone deceit which covers up employee theft. In proceedings of this type, it is not the Board's function to determine whether the employer had just cause to impose a penalty upon an employee, nor to determine what penalty would be just and reasonable. As noted above (in paragraph 18), it is the Board's function under section 91 to determine whether anti-union considerations formed any part of the employer's motivation for the discharge. If so, the discharge is an unfair labour practice even if viable non-union reasons for imposing a penalty co-existed with the anti-union reasons in the mind of the employer.

22. As indicated above, to remedy the responding party's contraventions of the Act, the Board, in its decision dated February 1, 1993, directed the Company to cease and desist from contravening the Act, to maintain the reinstatement of Mr. Quessy directed in the January 18, 1993 interim order, and to compensate him, with interest, for all lost wages and benefits resulting from its contraventions of the Act. To inform other employees of the Board's disposition of this matter, and to attempt to remedy the adverse psychological impact of the employer's contraventions of the Act, the Board also directed the Company to post in conspicuous places in its work place copies of the notice marked "Appendix" attached to that decision. Since we were (and are) not satisfied that the other remedial relief requested by the applicant was warranted in the circumstances of this case, we did not grant it.

23. In accordance with the Board's usual practice, we have remained seized of the application in the event that a dispute arises concerning the implementation or quantification of the orders which were made in these proceedings.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; March 11, 1993

1. Perhaps no provisions of the *Labour Relations Act* are more difficult to interpret than those relating to freedom of speech on the part of the employer particularly in the context of an organizing campaign. It has always been thus, and I would argue the difficulty persists notwithstanding amendments to the Act which came into force January 1, 1993.

2. While the recent amendments clearly reflect an intent on the part of the *Legislature* to facilitate, indeed promote, unionization I cannot believe that in pursuit of this public policy the *Legislature* intended a more stringent interpretation of free speech provisions given that those provisions were not amended.

3. In cases such as that before us the Board must decide, *inter alia*, whether the action of the employer, even in part, was born out of anti-union animus and whether the speech and/or actions of the employer would have served to have an intimidating effect on a "reasonable employee" even though the speech or action may have been inadvertent.

4. Dealing first with the question of intimidation the best evidence comes from the union witnesses Quessy and Stuart. Both witnesses affirmed that whatever was said, it was said to them alone. (I refer in particular to paragraphs 5, 6 and 7 of the majority decision). The majority view these two interviews as "stepping beyond the ambit of employer free speech and (entering) into the realm of employer interference and undue influence".

5. Since it is common ground that nothing of what transpired in these two meetings was known to anyone but the two witnesses, and whatever Quessy conveyed to the UFCW organizer, we need not have concern that employees in general were influenced. They knew nothing of the matter.

6. What of Quessy and Stuart? The UFCW organizer, Mr. Wauhkonen, evidently succeeded in allaying Quessy's apprehension to the point where Quessy proceeded to sign up ten more members, a number equal to those he said he enrolled prior to whatever trauma he experienced at the meeting with Mr. Wilkinson. The apparent ease with which Quessy's apprehension was assuaged is understandable in light of his direct testimony that with respect to his union organizing efforts Wilkinson said:

"It was fine but not to do it on (company time)."

Earlier in his direct examination regarding the December 19th meeting Quessy had testified as follows:

"They said I was not to approach people while they or I was working."

7. In view of the majority view of this meeting, as reflected at paragraph 6, it is useful to reflect on the following excerpts from my notes of Quessy's evidence in chief:

How was the question put to you as reasons (for organizing)?

I said we had been shown wages from unionized stores such as Zehrs, A & P and Loblaws.

.....

How did Wilkinson react?

He pulled out a sheet of paper with a union store in London.

What did he say?

The rates were for employees of my status at a store in London and they were less than I was getting. I was led to believe they were rates for people doing the same work I was doing.

What next....?

They mentioned the staff in our store would never see the type of rates Zehrs were getting because our store just could not afford it.

Did he mention "strike"?

He mentioned that before they would be put in the position of paying those wages they would be willing to strike and therefore close the store.

How would closure affect you?

I'd be without a job.

Wilkinson (testified) it was (a) fairly congenial meeting. How did you feel?

The way I feel whenever I go in front of two bosses, I wondered what it was all about.

Did your feelings change during the interview?

No.

What did Wilkinson say regarding a strike?

That the store in London did go on strike for I don't know how long - that this store would have to go on strike if we were to get the kind of rates Zehrs were getting. (my emphasis)

Any comment about "stress"?

Not that I recall.

.....

What were your feelings after the meeting?

I was starting to second guess my organizing having seen rates paid in London, wondering how beneficial it would be to get a union.

(my emphasis)

.....

8. Quesy's description of his "feelings" after the meeting suggest that, having seen data presented to him on the one hand by the union and on the other by Wilkinson, he was left to wonder whether unionizing would be such a good idea after all. Mr. Stuart described his feelings, in reaction to similar statements by Wilkinson at their meeting the same day. In an economy of clear verbiage Mr. Stuart said he thought it was "a lot of bullshit".

9. Still later, having opined that he thought Wilkinson was trying to stop the organizing or make it more difficult, Quesy was asked:

Did it work?

It slowed the process down a little but people were still signing.

10. I did not view Quessy as someone who had been interfered with by being told it was “fine” to organize but that he must not do it on company time, nor unduly influenced by being shown rates from another of the unionized stores from one of the chains shown to him by the union and by being told that, as was the case in the London store, it would take a strike to get rates comparable to those paid by Zehrs. His continued, and successful, organizing activity subsequent to the December 19 meeting is strong evidence he had not been deterred.

11. As noted by the majority at paragraph 7, stopping organizing on company time “is usually accomplished by means of a notice that is posted or distributed to employees by the employer”. I would regard telling the two organizers privately that it is “fine” to organize “but not (to do it) on company time” as indicative of a desire not to unduly upset employees, and the substance of the meetings with the two organizers as a reasonable effort to counter the “facts” provided by the UFCW organizer and well within the bounds of free speech contemplated by the Act. To find improper interference or undue influence is to ignore the evidence in chief of the unions own witnesses and, in particular, that of the individual said to have been aggrieved.

12. Turning to Mr. Quessy’s discharge the majority decision reflects even greater insensitivity to the realities of the workplace and the grave consequences of the Board signalling a tolerant attitude towards those who would abet theft.

13. In *any* economic climate a retailer operating on food store margins who would countenance lying which covers up employee theft invites financial disaster. To assert that such conduct would result in no more than a very stern warning “if not a suspension” is to ignore the reality of the need to take every measure possible to contain shrinkage if such operations are to survive. That such deceit is to be condoned when carried out in the context of an organizing drive sends a clear message indeed.

14. Having lied twice to Mr. McGhie, the Store Manager, Quessy was given a final opportunity by Wilkinson to be forthcoming and recant. Quessy asserted he did not know he was covering up a theft but I would have thought it reasonable to conclude that, by the third time of asking, a reasonable employee would have concluded whatever he was covering up was of some serious consequence. Had he then admitted to the lie and, upon learning from Wilkinson what had transpired, an assurance to Wilkinson similar to that which he gave the Board might have result in a different outcome. We will never know what Wilkinson’s reaction to a clean breast might have been but the majority decision sends out a clear message to liars - “Stick to your lie”.

15. For the foregoing reasons, I would have sustained the Quessy discharge.

3164-92-M International Union of Bricklayers and Allied Craftsmen Local 2, Ontario, Applicant v. **Metropolitan Toronto Apartment Builders Association** and Labourers' International Union of North America Local 183, Responding Parties v. Metropolitan Industrial & Commercial Masonry Contractors Inc., Responding Party (Intervenor #1) v. Masonry Contractors Association of Toronto Inc., Responding Party (Intervenor #2)

Bargaining Rights - Construction Industry - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Bricklayers' union Local 2 alleging that Builders Association, Labourers' union and others committing unfair labour practice by, *inter alia*, agreeing to sub-contracting clause in collective agreement between them requiring bricklaying work to be performed by companies bound to agreement with Labourers' union or Bricklayers' union Local 1 - Local 2 requesting that operation of sub-contracting clause be stayed pending resolution of unfair labour practice complaint - Board commenting on lack of particularity and absence of supporting facts establishing first-hand knowledge in declaration filed by Local 2 - Board also noting that interim relief applications may be decided without oral hearings and that parties who fail to provide complete written representations, as required by Rule 86, do so at their peril - Only very discrete core of Local 2's complaint supporting arguable case - Board considering delay in starting proceedings - No obvious reason why harm to Local 2 of denying application outweighing harm to responding parties of staying sub-contracting provision - Application for interim order dismissed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

APPEARANCES: *N. L. Jesin* and *Mario Dos Santos* for the applicant; *Bruce Binning* and *Richard Lyall* for Metropolitan Toronto Apartment Builders Association; *C. M. Mitchell*, *Q. Ceolin* and *R. Lotito* for Labourers, Local 183; *Jason Hanson*, *David Mombourquette* and *Brian McKinley* for Metropolitan Industrial & Commercial Masonry Contractors Inc.; *C. E. Humphrey* and *J. DeCوريا* for Masonry Contractors Association of Toronto Inc.

DECISION OF THE BOARD; March 15, 1993

1. The name of the first responding party is amended to: "Metropolitan Toronto Apartment Builders Association".
2. This is an application for interim relief made pursuant to the provisions of section 92.1 of the *Labour Relations Act*. On February 8, 1993, after hearing the submissions of the parties, the Board dismissed the application. These are our reasons for the ruling.
3. The application relates to a complaint under section 91 of the Act filed by the International Union of Bricklayers and Allied Craftsmen Local 2, Ontario ("Local 2") against the Metropolitan Toronto Apartment Builders Association ("MTABA") and the Labourers' International Union of North America, Local 183 ("Local 183"), among others. In the complaint, Local 2 alleges that the MTABA and Local 183 and others have violated sections 65, 67, 68 and 71 of the Act. The actions complained of include alleged misrepresentations and threats made by Local 183 and the Bricklayers, Masons, Independent Union of Canada, Local 1 ("Local 1") to a number of bricklayer contractors with whom Local 2 has bargaining rights and the signing of collective agreements between Local 183 and Local 1 and a number of these contractors. The complaint also contains allegations that Local 183 and the MTABA have violated the Act by agreeing to a sub-contracting clause in the collective agreement between them which requires that all bricklaying work be performed by companies bound to an agreement with Local 183 or Local 1.

4. The application is supported by the declaration of John Robbins. The declaration states:

DECLARATION

I JOHN ROBBINS, hereby declare that the facts contained in paragraphs 1, 2, 11, 12, 13, 14, 15, 16, 17 and 18 of Schedule "A" herein are within my knowledge and are correct. This declaration has been prepared under my instruction and I hereby confirm its accuracy.

Dated at North York this 2nd day of February, 1993.

"John Robbins"

John Robbins

5. The Schedule "A" referred to in the above declaration is contained in the complaint made under section 91 of the Act, attached to this application. The paragraphs which have been incorporated into Mr. Robbins' declaration are as follows:

SCHEDULE "A"

1. The International Union of Bricklayers and Allied Craftsmen, Ontario Provincial Conference and its local, Local 2 (the "Applicants") are designated in the industrial, commercial and institutional sector as the representative for all bricklayers, stone masons and their respective apprentices. In addition, the Applicants represent employees involved in bricklaying and masonry work in all other sectors of the construction industry.

2. Specifically within the residential sector, the Applicant Local 2, has for may [sic] years held bargaining rights in the greater Toronto area with employers active in the residential sector, both high rise and low rise.

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11. In or about the Spring of 1992, Local 183 commenced negotiations with the Metropolitan Toronto Apartment Builders Association ("MTABA") for a renewal of the collective agreement between them. The MTABA represents many employers engaged in the construction of high rise residential housing.

12. Local 2 has subsisting collective agreements covering bricklaying and masonry work with employers who are signatories to the MTABA-Local 183 agreement. Those employers include Konvey Construction Company Ltd., Mollenhauer Limited, Milne & Nichols Limited and West York Construction Ltd.

13. In addition, the Applicants hold bargaining rights for employers that are primary subcontractors of bricklaying and masonry work from the majority of the signatories to the MTABA agreement. Employers that fit in this category include:

Arcadia Group Investments Ltd.
Belmont Construction Company Ltd.
Bradscott Construction Co. Ltd.
Bramalea Limited
The Camrost Group Inc.
Coscan Development Corporation
Dirpam (1983) Limited
Erskine Building Corporation
Garcon Construction Inc.
Goldlist Construction Company
H & R Developments
Jaltas Inc.
Matthews Group Limited
Menkes Properties

New Style Developments
Ronto Development Limited
Shipp Corporation Limited
Sky Top Developments Limited
Tactix Construction Limited
Toddglen Construction Limited.

14. Local 183, did not and does not, represent any bricklayers employed by MTABA employers. Notwithstanding that they did not represent any affected employees they demanded that the revised collective agreement with the MTABA contain a subcontracting provision which requires that all bricklaying work be performed by companies bound to an agreement with Local 183 or Local 1.

15. As a result of Local 183's demands, the MTABA and its member companies agreed to revise the collective agreement and include as Article 1.04(a)(ix) the aforementioned subcontracting clause covering bricklaying. Article 1.04(a)(ix) is to take effect on February 1, 1993 in accordance with the provisions of the Letter of Understanding contained in Schedule "B" of the collective agreement. A copy of the collective agreement is included in Appendix "C".

16. Employers who are bound to a collective agreement with Local 2 have been advised that they will not be able to tender on bricklaying contracts on MTABA jobs.

17. The result of the circumstances as alleged, is that contractors bound to collective agreements with Local 2 will be put out of business. It is submitted that Local 183 and the MTABA have has [sic] interfered with the contractual relations between Local 2 and the employers which are bound to it.

18. It is submitted that Local 183 obtained the sub-contracting clause covering bricklaying work with MTABA for reasons other than the preservation of bargaining rights. Moreover, it is submitted that Local 183 and MTABA sought to undermine the bargaining rights held by Local 2.

6. The application also states:

5. The applicant makes the following representations as to why the specific interim order(s) should be made:

It is requested that the order be of 12 months duration in order that employers bound to Local 2 may bid on upcoming jobs during the current building season and complete those jobs using Local 2 members. The term of the collective agreement which is the subject of the order has already effectively prohibited companies bound to Local 2 from submitting bids on bricklaying jobs. As a result Local 2 members have lost employment opportunities to which they are otherwise entitled.

7. The Local 183 - MTABA collective agreement has been filed with us. We note that in addition to setting out the effective date of the sub-contracting provision in question, Schedule "B" of that agreement also states: "The formation of a common union of Local 183 and Local 1 must take place before December 31, 1993, failing which such provision will expire as of that date."

8. As is apparent, therefore, the interim relief requested pertains to one aspect of the complaint, the negotiation of sub-contracting language covering bricklaying work between the responding parties. Indeed, there are a number of parties to the main complaint, the bricklaying contractors whom it is alleged have signed collective agreements with Local 183 and Local 1, who have not been named as responding parties on this application for interim relief. To the extent that we review the allegations contained in the complaint for the purposes of this application, therefore, we confine our consideration to the portion of the complaint which is relevant to this application.

9. At the hearing into this application, the Metropolitan Industrial & Commercial Masonry Contractors Inc. ("MIC") and the Masonry Contractors Association of Toronto Inc.

("MCAT") sought to intervene. In addition to making submissions on the issues, MCAT sought to rely on a declaration filed with its response. After hearing submissions the panel ruled that, although neither MIC nor MCAT have a strictly legal interest in this proceeding, in the exercise of its discretion, the Board would give them standing to make oral submissions on the issues before it. However, having regard to the fact that the interests asserted are more of a commercial nature than a legal one, the Board restricted their participation to oral submissions. The Board, therefore, did not rely on the declaration submitted by MCAT on the merits of the interim relief application.

10. Local 183 filed a response, a declaration by Rocco Lotito, and written representations. No materials were filed by the MTABA. The materials filed by Local 183 take issue with most of the facts relied on by Local 2 in this application. In addition, the declaration sets out the facts that Local 183 relies on. These relate to, among other things, the delay in bringing this application, and the harm that would come to Local 183 if interim relief were granted.

11. The parties referred the panel to a number of court decisions. These cases deal with either the standards applied in determining whether to grant interlocutory injunctions, or the standards applied in determining whether to grant an interim order staying the operation of a decision of the Board, pending appeal. We find the latter group of cases of limited assistance to our deliberations. The factors taken into account by a court in deciding interlocutory injunction applications are somewhat more helpful. In particular, we find it necessary, as a first step, to assess whether there is any apparent merit to the complaint which forms the basis of this request for interim relief. Although we need not determine for the purposes of this application whether it is *likely* that Local 2 will succeed in its complaint, the apparent lack of an arguable case would be a relevant consideration in the exercise of our discretion to grant interim relief.

12. After spending a day of hearing reviewing the issues with the parties, it appears to us that there are considerable obstacles to the success of the complaint by Local 2.

13. As we outlined above, the complaint alleges violations of sections 65, 67, 68 and 71 of the Act. Having regard to the portion of the complaint relevant to this application, we have serious doubt as to whether it discloses any arguable case under sections 65, 67 and 71 of the Act, which read as follows:

65. No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

• • •

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

• • •

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

14. In our view, having regard to the material before us and the submissions of the parties, the only aspect of the complaint which appears to support any arguable case is that relating to section 68, which reads:

68.- (1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

15. Reduced to its essentials, *if* Local 2 holds bargaining rights for bricklayers engaged in the construction of apartment buildings (which is the scope of work covered by the Local 183-MTABA collective agreement and which, for ease of reference, will be referred to hereinafter as the "residential sector"), employed by the four companies named in Schedule "A" who are also party to the Local 183-MTABA agreement, then it is *arguable* that Local 183 and the MTABA have negotiated a collective agreement which is in conflict with the bargaining rights held by Local 2.

16. Local 2 seeks to base its assertion of bargaining rights with respect to these four companies, on its provincial agreement. This is a collective agreement between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario. The parties to this agreement have been designated as employee and employer bargaining agencies under section 141 of the Act for the purposes of bargaining in the *industrial, commercial and institutional* (ICI) sector of the construction industry in Ontario. Although the collective agreement is not apparently limited in scope to the ICI sector, there is nothing in the materials indicating how the employer bargaining agency has the authority to bargain for the four named companies with respect to the *residential* sector. We have not been referred to any Board certificates or voluntary recognition agreements signed by the four companies, covering the residential sector. There is nothing before us which reveals the source of the Local 2 bargaining rights in the residential sector with respect to these four companies. Local 2 does not assert that these four companies are or have ever been bound to a separate residential agreement. Incidentally, it appears that Local 2 does have a separate residential collective agreement, which has been signed by some of the contractors bound to the provincial agreement. It has not been signed, however, by these four MTABA members.

17. Given that the basis for the complaint by Local 2 with respect to the sub-contracting provision is based on an alleged interference with its bargaining rights in the residential sector, it would not be too onerous to require more particularity with respect to the source of its own bargaining rights. Thus, although it may be said that there is an arguable case, accepting all of the very broad statements made by Local 2 in this complaint, we are reluctant to give it very much weight in the context of this request for interim relief.

18. All of the parties have urged the Board to look at the relative harm which may arise from a decision to grant or deny interim relief. In support of this application, Local 2 has alleged that if this application is not granted, its members will lose employment opportunities. It has also stated that contractors bound to collective agreements with Local 2 will be put out of business. This panel accepts that members of Local 2 may well have fewer work opportunities as a result of the sub-contracting agreement between Local 183 and the MTABA. The very purpose of the sub-contracting provision is to increase the work opportunities for Local 183, or Local 1, members. Presumably, the result of granting the interim relief in favour of Local 2 would be the reduction of work opportunities to the members of Local 183 and Local 1.

19. Likewise, the bricklaying contractors bound to Local 183 and Local 1 collective agreements are also beneficiaries of the sub-contracting language. The granting of interim relief would therefore diminish the contracting opportunities available to these companies.

20. This panel has serious reservations about accepting the bald statement made by Local 2 that bricklaying contractors bound to its collective agreements will be put out of business. Firstly, there are absolutely no supporting facts in the declaration for this statement. Although John Robbins has attested that this is a fact "within his knowledge and correct", clearly, it can only be speculative. Without any further detail, and without elaboration as to how exactly this fact can be within *Mr. Robbins'* knowledge (it does not appear to us that he would be the party with the best knowledge on this and we would therefore also be interested to know why the party with the best knowledge is not the declarant), this panel prefers not to rely on such a statement.

21. In applications for interim relief, the materials on which the Board bases its determinations are essentially the pleadings accompanied by written declarations. Under the Board's Rules of Procedure, there is no provision for cross-examination on these declarations. The Board may schedule an oral hearing, as it did here, to hear the parties' submissions. It is evident that great reliance is placed on the written declarations. Thus, it is reasonable to expect these declarations to contain a certain level of detail and specificity, at least with respect to those matters which should be within the knowledge of the parties, such as the harm that will occur. Absent this, parties will encounter some reluctance from the Board about relying on broad statements without any supporting facts.

22. Secondly, as we have noted above, this panel views only a very discrete core of the complaint as supporting an arguable case. This "core of a case" relates to the four named MTABA contractors with whom Local 2 claims to have bargaining rights. Given that there are more than thirty member contractors listed in the MTABA agreement, it appears to us that the harm alleged will occur apart from the facts alleged with respect to these four particular contractors in any case.

23. Further, this panel is concerned about the effect of granting interim relief on the bargaining relationship between Local 183 and the MTABA. The declaration of Rocco Lotito, submitted by Local 183, states:

If the interim relief is granted, Local 183 will have lost an essential component of the collective agreement which it bargained for in April 1992 at the request of a stranger to that collective

agreement, without obtaining any compensating benefits from the party with whom it bargained. Collective bargaining for this collective agreement and others required the giving of concessions in order to obtain advantages. If the relief is granted, the advantage negotiated by Local 183 is lost, and the concessions it had to make to obtain the subcontracting clause have been lost as well. In short, the Board is being asked to change the essential bargain that MTABA and Local 183 arrived at through open and lawful collective bargaining, at the request of a stranger, who cannot claim any direct benefit, and who has had to give up nothing to obtain the relief requested.

24. In our view, this is a significant factor. There is no doubt that a Board order staying the effect of one of the provisions in the collective agreement would be a serious intrusion into the bargain made between Local 183 and the MTABA.

25. Local 183 and the MTABA also submit that delay by Local 2 in bringing the complaint and this application ought to lead to the refusal of relief. The collective agreement which is under attack was entered into in April 1992. The complaint was filed on January 21, 1993, and the application on February 2. Local 2 submits that it did not know of the existence of the sub-contracting language until December of 1992, although it does not deny that a number of Local 2 sub-contractors took issue with it immediately after the signing of the agreement. Given the purported damaging effect that Local 2 claims the agreement has on its own interests and the interests of Local 2 sub-contractors, the length of time which has elapsed is somewhat surprising. As argued before us, the interests of Local 2 and of the sub-contractors bound to Local 2 agreements are almost the same in this matter, and we find that Local 2 should have known earlier of it.

26. We are inclined to agree that delay in starting proceedings is a factor which the Board may take into account. In this case, had the complaint by Local 2 been made immediately, there would have been no need for it to apply for interim relief, since the sub-contracting provision had a delayed effective date, until February 1, 1993. It is arguable, therefore, that the other parties have been prejudiced by the delay, in that they have been denied the opportunity to deal with the matter at a time before the clause came into effect.

27. In sum, therefore, there is no obvious reason why the harm to Local 2 of denying this application outweighs the harm to the responding parties of staying the sub-contracting provision of their collective agreement. The delay in bringing the complaint has contributed to the harm that would result from granting the application. Further, although we have found that there is a core of an arguable case in the complaint, the lack of specificity as to some of its essential elements leads us to view this with some circumspection, where these facts are within the knowledge of the applicant.

28. Before we conclude, we wish to comment on a few procedural matters raised during the hearing. Submissions were made by counsel for Local 183 at the hearing, supported by counsel for the MTABA, that the application filed was not in compliance with Rule 86 of the Board's Rules of Procedure requiring "complete written representations in support of the applicant's position". It is true that the materials in the application are sparse. However, the issues raised are disclosed to the extent necessary for the responding parties to know the case they must meet, and the applicant did not seek to go beyond them in oral argument. Parties should be aware, however, that under its Rules, the Board may decide an application for interim relief without an oral hearing. If they choose to rely on scant materials, it is at their peril.

29. Also, no response and no declarations were filed by the MTABA in this matter. Local 2 submitted that the MTABA should be deemed to have accepted all of the facts stated in its application as a result, pursuant to Rule 19. We did not view this as an appropriate case for the application of Rule 19, and so ruled at the hearing. Counsel for the MTABA did not seek to file any

materials at the hearing, and stated that he would be making oral submissions in support of the response and materials filed by Local 183.

30. Since the hearing in this matter, another panel of the Board has released its decision in 810048 *Ontario Limited c.o.b. as Loeb Highland*, Board File No. 2912-92-M [now reported at [1993] OLRB Rep. Mar. 197], the reasons for which we consider to be consistent with our findings herein.

2159-92-U International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - U.A.W., Applicant v. Morrison's Meat Packers Ltd., Responding Party

Evidence - Practice and Procedure - Unfair Labour Practice - Board not permitting counsel to pursue line of questioning where application did not particularize any of the facts on which the union was seeking to cross-examine

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

APPEARANCES: *Elizabeth Mitchell, Don Caryn, Leslie Cook, Jim Sawyer, Fred Jepson, Bill Butler* and *Terry Hartman* for the applicant; *Ian S. Campbell, Paul Boniferno* and *Ron Dancey* for the responding party.

DECISION OF THE BOARD; March 1, 1993

1. During its cross-examination of Ron Dancey, the president and CEO of the responding party, the applicant sought to ask certain questions. In particular, it sought to put to him that he had made certain statements to Suzanne Simmicks, one of the grievors in this matter. No particulars of any of these alleged statements, which the union indicated it was prepared to prove through the grievor Simmicks, were included in any of the material filed by the applicant in support of its application. Consequently, the responding party objected to the applicant pursuing this line of questioning. The applicant asserted that this line of questioning was relevant to the issue of the witness' credibility and that, further, it was evidence which could allow the Board to draw an inference of anti-union animus. The applicant also suggested that while the statements alleged to have been made by Mr. Dancey did not, of themselves, amount to "improper conduct" (as that term is used in section 72 of the Board's former Rules of Procedure), they could or would contribute to a finding of anti-union animus.

2. After recessing to consider the parties' submissions the Board delivered the following oral ruling:

Rule 12(d) of the Board's Rules of Procedure reads as follows:

12. Any application filed with the Board must include the following details:

...

- d) a detailed statement of all the material facts on which the applicant relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.

Under Rule 124 these rules come into force on January 1, 1993 and Rule 125 provides:

125. These Rules apply to all cases before the Board on the date these Rules come into force, unless the Board orders otherwise.

Rule 12(d) does not speak to “allegations of improper conduct” but rather to a “detailed statement of all the material facts on which the applicant relies”.

In this case the applicant seeks to pose questions regarding facts it asserts will contribute to the Board ultimately drawing inferences of anti-union animus. The application does not particularize any of the facts on which the union now seeks to cross-examine. We are of the view that under the new rules the union was under an obligation to particularize these material facts and could, at a minimum, have provided additional particulars between January 1, 1993 [the date the new rules came into force] and the commencement of Mr. Dancey’s evidence [on February 22, 1993]. We will not permit the applicant to pursue this line of questioning.

3238-92-JD Ontario Sheet Metal Workers’ & Roofers’ Conference; Sheet Metal Workers’ International Association, Local 473, Applicants v. Ontario Hydro; Electrical Power Systems Construction Association; Labourers’ International Union of North America, Local 1059, Responding Parties

Jurisdictional Dispute - Practice and Procedure - Parties disputing assignment of work in connection with removal for scrap of exterior metal siding - Board declaring that work in dispute should be assigned to Sheet Metal Workers’ union - Board observing that “kitchen sink” approach to preparation of briefs in jurisdictional dispute complaints not particularly helpful - Board noting that parties in this case could properly have focused on the practice relating specifically to the work in dispute and the application of the employer’s policy with respect to the assignment of such work

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *J. Raso*, *Gord Stewart*, and *Ron Pollock* for the applicant; *M. Patrick Moran* and *M. Shecter* for EPSCA; *M. Patrick Moran* and *Jack Davidson* for Ontario Hydro; *John Moszynski*, *Jim McKinnon*, *Carolyn Hart*, *Bill Casemore*, and *Rick Rock* for Labourers’, Local 1059.

DECISION OF THE BOARD; March 8, 1993

1. On March 1, 1993, the Board held a consultation in this application concerning a complaint about an assignment of work.
2. Upon considering the written representations and other materials filed by the parties, and their oral representations during the consultation, the Board ruled, orally, that:
 - (a) there was nothing with respect to which the Board either found it necessary to or wished to hear evidence;

- (b) that the Board was satisfied that the application could be properly disposed of on the basis of the materials and representations before the Board, and that it was appropriate for the Board to do so; and
- (c) that this complaint should be allowed.

The Board therefore:

- (a) declared that the work in dispute; namely, the work in connection with the removal for scrap of exterior metal siding from the roof of the Bruce Nuclear Power Developments Steambridge - Reactor and Turbine Buildings, should have been assigned to members of the applicant Ontario Sheet Metal Workers' & Roofers' Conference and its affiliate Sheet Metal Workers' International Association, Local 473; and
- (b) ordered that all such future work in Board Area #3 assigned by Ontario Hydro or the Electrical Power Systems Construction Association be assigned to members of the Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 473.

The Board's declaration and order must be read subject to the reasons for the Board's decision which follow.

3. Though there were some minor differences in the wording used by the parties to describe the work in dispute herein, there was substantial agreement between them in that respect; namely, that it was the work in connection with the removal for scrap of exterior sheet metal siding from the roof of the Bruce Nuclear Power Developments Steambridge - Reactor and Turbine Buildings.

4. It was common ground that, in 1992, it was determined that the Steambridge running between the Reactor and Turbine Buildings at the Bruce Nuclear Power Development was unsafe and should be removed. The work program in that respect was to proceed piecemeal as finances permitted and included the removal of sheet metal roofing for scrap (that is, the work in dispute).

5. A mark-up meeting was held with respect to work which included the work in dispute herein on July 24, 1992. At that meeting Ontario Hydro ("Hydro") announced its proposed assignment for each of the jobs being marked up. The Sheet Metal Workers' International Association, Local 473 claimed the work in dispute for its members. However, Hydro assigned it to members of the Labourers' International Union of North America, Local 1059 (the "Labourers"). Hydro subsequently confirmed that assignment by letter dated August 10, 1992 and members of the Labourers in fact performed the work in dispute.

6. In this application, the Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 473 (the "Sheet Metal Workers") claimed the work in dispute on the basis that their members installed the sheet metal roofing in the first place. They relied upon what they asserted was a long-standing Hydro policy in that respect and on what they asserted was in fact Hydro's practice.

7. Hydro acknowledged that it had a policy pursuant to which members of the installing trade are assigned to remove material which is to be replaced or which is to be salvaged or reused.

However, Hydro asserted that where, as in this case, the material being removed was going directly to scrap, the removal work is properly assigned to members of the Labourers' International Union of North America and in this case of its Local 1059. Although Hydro initially argued that the specialty demolition skills possessed by members of the Labourers favoured the assignment to them, it subsequently acknowledged that any such specialty skills were not necessary to perform the work in dispute herein.

8. The Labourers adopted Hydro's submissions and further submitted that the structure in question was really free-standing scrap which was in effect the first drop point, that it is work which its members have historically done, and that the nature of the work was such that it was neither necessary nor appropriate for members of the Sheet Metal Workers, as the installing trade, to perform it.

9. Neither Hydro nor the Labourers was able to point to any examples of work in connection with the removal of exterior sheet metal siding in Board Area #3 which had been made the subject of the mark-up meeting and been assigned to members of the Labourers. They did point to a number of examples of "field assignments" of such work to members of the Labourers. However, because of the manner in which field assignments are made, the Board generally gives such assignments much less weight as evidence of past practice than it does to assignments made as a result of a mark-up process in which the jurisdictional claims of interested trade unions can be made and assessed.

10. On the other hand, the Sheet Metal Workers were able to point to Hydro's own written policy with respect to the assignment of "removal" work. This policy appears in various forms, although its thrust is consistent. The following example, taken from documents with respect to a Hydro mark-up meeting held on January 17, 1991 is as clear a statement of that policy as any;

the trade group who installed the equipment/ system will be assigned the removal activity.

the trade assigned the removal will move the equipment or system to the first drop point.

if the equipment/material is considered "scrap" the labours will be assigned the removal from the first drop point to the loading area. (Subject to trade work assignments and agreements)

[sic]

The Sheet Metal Workers were also able to provide a number of examples of assignments of work like the work in dispute herein by Hydro to their members, and also examples of applications of the aforesaid Hydro policy to the removal of material installed by other trades.

11. The Board was satisfied that Hydro's express policy is to assign removal work of scrap material to the installing trade as far as the first drop point, and that this policy favoured the Sheet Metal Workers claim to the work in dispute. Further, Hydro's own practice in the Board Area #3 has been consistent with that policy insofar as the assignment of work through the mark-up process is concerned. Because assignments made through a mark-up process are greater weight than field assignments, the factor of area practice favoured the Sheet Metal Workers as well.

12. In our view, the criterion of skills, training and ability favoured neither the Sheet Metal Workers nor the Labourers. The work in dispute required neither the specialized skills of a sheet metal worker nor the specialized demolition skills of a labourer. Either of them can do it.

13. Nor did the criterion of the economy and efficiency favour either trade unions' claim. It

may have been less expensive for Hydro to assign the work to members of the Labourers, but trade jurisdiction cannot be bought and sold.

14. Nor did the Board accept the assertion of Hydro and the Labourers that the structure in question here was in effect standing scrap that itself constituted the first drop point.

15. In the result, the Board was satisfied that the Sheet Metal Workers had made out their claim to the work in dispute and that the removal for scrap of the exterior sheet metal siding from the roof of the Bruce Nuclear Power Developments Steambridge - Reactor and Turbine Buildings in issue herein should have been assigned to members of the Sheet Metal Workers *to the first drop point*. Pursuant to section 93(1.2) of the Act, the Board found it appropriate to make a final order in that respect without further inquiry into the matter.

16. Further, pursuant to section 93(2) of the Act, the Board found it appropriate to order that all such future work assignments in Board Area #3 by Hydro or the Electrical Power Systems Construction Association be made to members of the Sheet Metal Workers.

17. The Board therefore ruled aforesaid (see paragraph 2, above).

18. We wish to venture one further brief comment. The jurisdictional dispute process in effect since January 1, 1993 contemplates a speedy disposition of applications made to the Board in that respect. The process requires that parties to such a proceeding file extensive Briefs of submissions and documents. In some respects, the process encourages parties to err on the side of caution when they prepare their Briefs in terms of what they include in them. While there is nothing particularly wrong with that, we respectfully suggest that the "kitchen sink" approach to such Briefs is not particularly helpful. In this case, for example, the parties filed hundreds of pages of material relating to the "practice" upon which they wished to rely. Because this was a "removal for scrap" assignment, we found the "removal and replace" and "installation" assignments materials of no real assistance. In our view, the parties could properly have focused on the practice relating specifically to the work in dispute and the application of the Hydro policy with respect to the assignment of such work. The parties could probably have saved themselves much time and money by taking a more focused approach. Further, a party does not strengthen its case by including materials which do not in fact support it.

1896-92-R United Food and Commercial Workers International Union, Local 175/633, Applicant v. **Penny Lane Food Markets Ltd.**, Responding Party v. Group of Employees, Objectors

Bargaining Rights - Sale of a Business - All events material to application occurring prior to coming into force on January 1, 1993 of amendments to *Labour Relations Act*, including amendments to section 64 - Board hearing held after January 1, 1993 - Board applying section 64, as it existed prior to amendments, to facts of the case - Responding employer owning and operating retail food store previously owned and operated as retail food store by A & P - Store directly sub-let by A & P to responding employer - Even if result could be said to be expansion of responding employer's existing business, result accomplished through acquisition of part of A & P's business - Transaction constituting sale of business within meaning of the Act - Declaration issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Rundle* and *P. V. Grasso*.

APPEARANCES: *C. D. Watson* and *John Fuller* for the applicant; *A. David G. Purdy* and *Peter Deluca* for the responding party; *Sharon Randall* for the objectors.

DECISION OF THE BOARD; March 23, 1993

1. This is an application, under section 64 of the *Labour Relations Act*. The applicant (which although two Local Unions are referred to in its name, has styled itself as a single entity) seeks:

- (a) a declaration that there has been a sale of a business by the Grant Atlantic & Pacific Company of Canada, Limited ("A & P") (which the applicant has not named as a responding party and which has not participated in this proceeding) to the responding employer Penny Lane Food Markets Ltd., and that it represents employees of the responding employer in a like bargaining unit;
- (b) a declaration that the responding employer is bound by the collective agreement which, once ratified, will be in effect between A & P and the applicant; and
- (c) in the alternative to (b), a declaration that the responding employer is bound by the prior collective agreement in effect between A & P and the applicant and the notice to bargain given to A & P under that collective agreement.

Though other relief was sought in the application as filed, no mention of it was made at the hearing.

2. The responding party submits that there has been no sale of a business, within the meaning of section 64 of the Act, as alleged by the applicant. The responding party submits that it did not purchase any part of A & P's business, but that it merely expanded its own business, which is different from A & P's because of the emphasis on "fresh goods" in the responding employer's business. In the alternative, the responding party submits that even if there has been a sale of a business, there is no collective agreement which is applicable or binding on the employer or any of its employees.

3. The group of employees which intervened in the proceeding expressed opposition of the applicant and requested that the Board at least direct a representation vote before granting any of the relief sought by the applicant.

4. The material facts herein are not particularly complicated. Penny Lane Fruit Market Inc. operates a retail food store in Scarborough. The responding employer, Penny Lane Food Market Ltd., operates a retail food store in Mississauga out of a location which used to be a retail food store operated by New Miracle Food Mart Inc. as a Miracle Food Mart. It is the latter store which is the subject of this application. It appears that New Miracle Food Mart Inc. is controlled by A & P. The Miracle Food Mart store in question herein was one of eleven stores which A & P was required to divest itself of in consideration for obtaining the requisite approval under the *Competition Act* of the Director of Investigation and Research of the Federal Bureau of Competition Policy, for the sale of sixty-nine Miracle Food Mart and Ultra Mart retail food stores from Steinberg Inc. to A & P.

5. Although the principals of record of Penny Lane Fruit Market Inc. and Penny Lane Food Market Ltd. are different for corporate and tax purposes, they appear to be, for practical purposes, under common direction and control. Indeed, the responding employer's argument that the transaction between it and A & P which is the subject of this application was an expansion of

the existing business of Penny Lane Fruit Market Inc. is premised on that being the case. Further, Peter Deluca, who in our view is a principal of the responding employer even if he is not specifically identified as such in its corporate records, testified that “two years ago we were looking for a new investment to expand our present business [a reference to Penny Lane Fruit Market Inc. in Scarborough] ... we were directed by our main supplier to three or four locations that A & P was selling.”

6. Deluca pursued this possibility, with some assistance from Carmen Ciardullo, who he identified as a “partner”, and approached A & P in September or October 1991 with respect to the Miracle Mart store located at 3200 Erin Mills Parkway in Mississauga.

7. After some discussion, Deluca and Ciardullo signed a letter of agreement dated January 18, 1992 in which they agreed, on behalf of a company to be incorporated, to “purchase or lease” the Erin Mills Parkway store from A & P. This was no more than an agreement to make an agreement, and it was apparent from the outset that the transaction was to be a lease rather than a purchase, which lease was itself a sub-lease conditional upon the consent of the landlord, 566719 Ontario Limited.

8. Subsequently, Deluca investigated the store location in more detail and discovered several things which concerned him, one of which was the collective agreement then in effect between A & P and the applicant which was applicable to the location.

9. On March 16, 1992, Penny Lane Food Market Ltd., which was not yet actually incorporated at that time, entered into another “deal to make a deal” with A & P on substantially the same terms as the January 18, 1992 agreement but with a lower rental fee. Deluca and Ciardullo signed the agreement on behalf of the then still non-existent Penny Lane Food Market Ltd.

10. Penny Lane Food Market Ltd. was incorporated on April 7, 1992.

11. The landlord still had not given its consent to the proposed sub-lease, and seemed reluctant to do so. However, Deluca managed to persuade it to do so, and all parties concerned executed a Consent to Sub-lease dated June 11, 1992 with respect to the Erin Mills Parkway store.

12. Although the March 16, 1992 agreement listed June 29, 1992 as the closing date for the transaction, the deal did not close until August 11, 1992. On August 11, 1992, Penny Lane Food Market Ltd. entered into various agreements with New Miracle Food Mart Inc. (which was the actual nominal tenant) to sub-let the store premises at the 3200 Erin Mills Parkway in Mississauga. The responding employer took possession of the premises on that date.

13. August 11, 1992 was a Monday. A & P operated its Miracle Mart store at the location until August 9, the preceding Saturday. Although the Miracle Mart A & P employees had been given some indication of the closure of the Miracle Mart store earlier, public notices were not posted until a week or two prior to August 11, 1992.

14. The responding employer did not re-open the store until September 23, 1992. In the interim, it renovated the store, which renovations included some expansion and relocation of the fresh food departments.

15. In the meantime, the collective agreement between the applicant and A & P applicable to the Miracle Mart location expired, on June 22, 1992. The applicant had previously given A & P written notice to bargain a new collective agreement. No new agreement was in place on August

11, 1992. Indeed, a new collective agreement was not negotiated until late January 1993 and that collective agreement had not yet been ratified at the time that the hearings herein concluded.

16. Extensive amendments to the *Labour Relations Act* came into force on January 1, 1993. Included in the amendments were changes to section 64, the operative provision herein. Prior to January 1, 1993, sections 64(1) through (6) provided that:

64. (1) In this section,

“business” includes a part or parts thereof;

“sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 54, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 54, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represent the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2)

becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

(6) Despite subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any shall be the bargaining agent or agents for the employees in the unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

Now, section 64(1) through (6) provides that:

64.(1) In this section,

“business” includes one or more parts of a business; (“enterprise”)

“predecessor employer” means an employer who sells his, her or its business; (“employeur précédent”)

“sells” includes leases, transfers and any other manner of disposition; (“vend”)

“successor employer” means an employer to whom the predecessor employer sells the business. (“employeur qui succède”)

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

(2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:

- 1. A proceeding before the Board under any Act.
- 2. A proceeding before another person or body under this Act or the *Hospital Labour Disputes Arbitration Act*.
- 3. A proceeding before the Board or another person or body relating to the collective agreement.

(2.2) If the predecessor employer has given or been given a notice relating to bargaining for a collective agreement or has requested the appointment of a conciliation officer or mediator, the

successor employer is considered to have given or been given the notice or to have made the request, until the Board declares otherwise.

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

(4) An interested person, trade union or council of trade unions may apply to the Board to determine,

- (a) a question concerning the scope of bargaining rights of the trade union referred to in subsection (3); or
- (b) a conflict in the bargaining rights of the trade union referred to in subsection (3) and another trade union representing employees of the successor employer.

(4.1) On an application under clause (4)(a), the Board may alter the composition of the bargaining unit for which the trade union referred to in subsection (3) holds bargaining rights.

(4.2) On an application under clause (4)(b), the Board may alter the description of a bargaining unit in a certificate issued to any trade union or the definition of a bargaining unit in a collective agreement.

(5) An interested person, trade union or council of trade unions may apply to the Board within sixty days after the predecessor employer sells the business for the termination of the bargaining rights of the trade union referred to in subsection (3).

(5.1) On an application under subsection (5), the Board may terminate the bargaining rights of the trade union only if it considers that the successor employer has changed the character of the business so that it is substantially different from the business of the predecessor employer.

(6) This subsection applies if the successor employer carries on one or more other businesses and the successor employer intermingles the employees of the business sold to him, her or it with those of another business. On application, the Board may,

- (a) declare that the successor employer is no longer bound by the collective agreement to which the predecessor employer was bound;
- (b) determine the unit or units of employees that are appropriate for collective bargaining;
- (c) declare which trade union or council of trade unions, if any, becomes the bargaining agent for the employees in each of the bargaining units;
- (d) amend, to the extent the Board considers necessary, any certificate issued to a trade union or council of trade unions or any bargaining unit defined in any collective agreement; and
- (e) define or redefine the seniority rights under any collective agreement of the employees concerned.

17. It is apparent that the result in this case may depend in part on which section 64, the one in effect prior to January 1, 1993 or the one now in effect, applies. Is the present section 64 retroactive to the times and material to this application? In the alternative, is the present section 64 retrospective in its application such that it captures this application?

18. “Retroactive” legislation looks back in time and changes the law from what it was dur-

ing a period prior to its enactment. Generally, legislation is made retroactive in one of two ways. It either specifically states that it shall be deemed to have come into force as of some previous specified date, or it is expressed to the operative with respect to past events as of some previous time.

19. “Retrospective” legislation changes the law as of the date it was enacted. However, it looks to past events and attaches new consequences to events or transactions begun or even completed prior to its enactment, in terms of the continuing affect of such events or transactions.

20. In the second edition of his book *Construction of Statutes* (1983, Butterworths, Toronto), the noted author Elmer A. Driedger offers the following summary (at pages 202 to 203):

1. A retroactive statute is one that changes the law as of a time prior to an enactment.
2.
 - (a) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.
 - (b) A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.
 - (c) A statute is not retrospective unless the description of the prior event is the fact situation that brings about the operation of the statute.
3. The presumption [against retrospectivity] does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
4. The presumption [against retrospectivity] does not apply if the new prejudicial consequences are intended as protection for the public rather than as a punishment for a prior event.

21. The jurisprudence dealing with the question of the application of newly enacted legislation distinguishes, for analytical purposes, between “events” and “characteristics” or “status”. Of course, there must generally be “events” before a “characteristic” or a “status” can be created. Nevertheless, legislation operates retrospectively if it is triggered by a prior event described in it, but not if it is triggered by a characteristic or status which existed before the legislation was enacted. Further, there are presumptions, which though related are not the same, which are applicable. These are the presumptions against the retrospective application of a statute, and against the interference with vested rights. The theory behind these related presumptions is that the law must be predictable in order to be fair, that people (and corporations) should be entitled to order their affairs in accordance with the present state of the law, and that it should be assumed that the Legislature’s intent is not to interfere with rights which are vested unless the contrary intent is clear from the legislation.

22. However, of the three kinds of legislative enactments identified by Driedger, *supra*, only one attracts the presumption against retrospectivity:

- (a) legislation which attaches benevolent consequences to prior events *does not* attract the presumption;
- (b) legislation which attaches prejudicial consequences to prior events *does* attract the presumption;
- (c) legislation which imposes a penalty on a party described by reference to prior events, but which penalty is not a consequence of such events, *does not* attract the presumption.

23. Clearly, section 64 was and is intended to confer a benefit upon trade unions which they would not enjoy under the common law or traditional commercial law. Further, it is apparent that the amendments to section 64 which came into effect on January 1, 1993 were intended to expand the benefit that existed previously in that respect. Whether the amendments result in a corresponding prejudice may depend on one's perspective, although, as the Saskatchewan Court of Appeal observed in *National Trust Co. Ltd. v. Larsen et. al* (1989) 61 D.L.R. 4th 270, "... one's man benefit is another's burden." Proponents of the amendments to section 64 might say they create no prejudice. It seems likely that employers would beg to differ.

24. It is useful to focus on the change in section 64 which is probably most significant in the context of this application; namely, the insertion into section 64 of section 64(2.2). This provision did not previously exist, and has the effect of overturning the Board's jurisprudence to the contrary (that is, that notice to bargain given to a predecessor (vendor) employer is not binding on a successor (purchaser) employer: see, for example, *Oxford Manor Rest Home*, [1980] OLRB Rep. Dec. 1786). Further, under section 64 as it was prior to January 1, 1993, where there was no collective agreement in force but the terms and conditions of employment were frozen by the operation of section 81(1) of the Act at the time the transaction said to be a "sale" (as the case herein), the provisions of section 81(1) lapsed until a notice to bargain was given to the alleged successor employer (see, *The Winchester Press Ltd.*, [1982] OLRB Rep. Feb. 284; *Oxford Manor Rest Home*, *supra*). Because of the addition of section 64(2.2), That would not be the case under the present section 64.

25. In this case, all of the events material to the application occurred prior to the coming into force, on January 1, 1993, of the amendments of the *Labour Relations Act*, including the amendments to section 64. Indeed, the application was both filed and originally scheduled to be heard prior to January 1, 1993. It is purely fortuitous that the application was not in fact heard until after January 1, 1993.

26. Both prior to and since January 1, 1993, the focus of section 64 of the Act has been on the time when the transaction which constitutes the alleged "sale of a business" took place. Further, the parties, and the affected employees who are, after all, the real subject of the application, stand in a very different position relative to each other under the present section 64 than they did under section 64 as it was prior to January 1, 1993.

27. In the Board's view, to apply the present section 64 to the circumstances herein would be apply it to events which occurred prior to its enactment; that is, retrospectively. Because the new section 64 attaches new consequences which in our view would be prejudicial to the responding employer, the presumption against retrospectivity applies. Unlike section 64.2 of the Act, which did not exist prior to January 1, 1993 either, and which seems also to have been enacted in response to the Board's jurisprudence in that area, there is no indication of any legislative intent which would operate to rebut that presumption.

28. In the result, the Board is satisfied it is the provisions of section 64 of the *Labour Relations Act* as it was prior to January 1, 1993, which was in effect at all material times, which apply to this case. Accordingly, all further references herein to section 64 of the Act are to that provision as it was prior to January 1, 1993.

29. In applying that provision to this application, the Board finds that a sale of a business by A & P to the responding employer took place on August 11, 1992.

30. For purposes of section 64, any manner of disposition, including a lease, constitutes a "sale". Clearly, there was a disposition by A & P to the responding employer in this case. The real

issue was whether what was disposed of, or “sold” to use the section 64 vernacular, was a “business”, which for section 64 purposes includes any part of a business.

31. Section 64, both as it was prior to January 1, 1993 and now, is remedial legislation designed to prevent the intentional or incidental frustration or erosion of established bargaining rights as a result of changes in the structure or ownership of a business or part of a business. It operates to attach bargaining rights to a business activity. Like section 1(4) of the Act, an analogous provision, section 64 recognizes that, for labour relations purposes, a “business” is a concept which does not lend itself to precise definition. For purposes of the *Labour Relations Act*, a “business” is an economic activity, whether for profit or not, which can be conducted through a variety of legal vehicles or arrangements. It is this activity, not its form or who owns it, which gives rise to employer-employee-trade union relationships which are regulated by the Act and to which bargaining rights attach. Consequently, bargaining rights, once established, attach to the activity, as the employer, rather than to a particular name, form or owner, and so long as that activity continues the bargaining rights continue to exist. Common law or commercial law concepts have limited application in section 64 proceedings. Indeed, it is those very concepts and the labour relations mischief which they caused which section 64 (and section 1(4)) is intended to remedy.

32. The purpose of section 64 is to preserve established bargaining rights, not to extend them or to create bargaining rights where they previously did not exist. It is the labour relations aspect of a business which is the focus of section 64. It is the continuity of an activity which is significant. For purposes of section 64, “business” is not necessarily synonymous with a particular group or kind of employees, or the work they perform. Concomitantly, bargaining rights do not necessarily attach to particular employees or work. Although a continuity in the work performed, or the employees performing it, may be significant, neither is necessarily sufficient to justify a finding that a transaction constitutes a “sale of a business” which attracts the consequences of section 64. The focus of the inquiry is on the transaction. Is what has been given up by one entity to another entity an activity to which existing bargaining rights attach, and which bargaining rights are therefore part of what the receiving entity has obtained (see, *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *British American Bank Note Co.*, [1979] OLRB Rep. Feb. 72; *Kitchener Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130)?.

33. To argue, as the responding employer did, that it was merely expanding its own existing does little to advance the issue. After all, one way in which one can expand one’s own business is to buy someone else’s. Nor, in the context of the retail food industry, is it particularly significant that “good will and various intangible assets such as telephone numbers and business names” were not part of the disposition by A & P to the responding employer. The Board noted as long ago *Dutch Boy Food Markets* (1965) 65 CLLC ¶16,051 (and there is nothing before the Board to suggest that things are any different now), that the nature of the retail food business is such that with the exception of its name, there is no real “good will”, or indeed other intangible asset associated with many other kinds of businesses, which a vendor can give to or withhold from a purchaser. Further, the success of a retail food store largely depends on its location. Consequently, while the location and physical premises are not by themselves “the business” in the retail food industry, they are important elements of it (see, among others, *Dutch Boy Food Markets*, *supra*; *Leader’s Clover Farms Food Market*, [1966] OLRB Rep. Nov. 636; *Provincial Fruit Company (Ottawa) Limited*, [1975] OLRB Rep. Nov. 830; *More Groceteria*, [1980] OLRB Rep. Apr. 486; *Canada Safeway Limited*, [1986] OLRB Rep. Nov. 1498). How important the location and the premises are will depend on the circumstances. Certainly, the “location” factor is not determinative of the question in a section 64 application (see, for example, *Sunnybrook Food Market*, [1966] OLRB Rep. Oct. 531; *Zehrs Markets Limited*, [1974] OLRB Rep. May 331; *Valencia Foods*, [1984] OLRB

Rep. May 773; *Keele-Wilson Supermarket Limited*, [1985] OLRB Rep. March 425; *Miracle Food Mart, Steinberg Inc.*, [1988] OLRB Rep. July 679).

34. In this case, the responding employer took over a premises run by A & P as a retail food store. While it made over the store to suit its image and vision of a modern retail food store, the differences are primarily cosmetic and reflective of a different marketing philosophy. Though the responding employer places greater emphasis on fresh food products than did A & P, this is also more a response to the shopping habits of the modern consumer than anything else. Traditional grocery items remain the foundation of the store's business. The responding employer occupies the same market niche as A & P did through its Miracle Mart store. The total number of employees (67 versus 65 when it was a Miracle Mart) and the composition of the workforce (25 full-time and 42 part-time versus 17 full-time and 48 part-time when it was a Miracle Mart) suggests that the operation is very much the same except for the somewhat greater emphasis on fresh food products. (We note that there is no suggestion that any of the the persons presently employed by the responding employer were previously employees of A & P in the store when it operated as Miracle Mart.) Nor is there any indication that A & P abandoned its business at that location. On the contrary, it had no choice but to sell off some of its stores, and in rationalizing its business to meet the requirements of the federal *Competition Act* this former Miracle Mart location was earmarked as one of the stores to be disposed of. Further, while there is evidence which suggests that A & P made some effort to persuade Miracle Mart customers to shop at other A & P owned stores, the circumstances are such that this indicates no more than A & P continues to have a presence in the general market area.

35. The documentary evidence also suggests that the transaction between A & P and the responding employer was a sale of a business within the meaning of the Act. In both *Steinberg Inc.* [1989] OLRB Rep. Oct. 1066 and *Steinberg Inc.*, [1990] OLRB Rep. July 794 upon which the responding employer relied, there were no direct or indirect dealings between the original and subsequent operators of the retail food store at the locations in question. There was no link between the alleged vendor and the alleged purchaser. In this case, the dealings between A & P and the responding employer were direct. Further, what passed from A & P to the responding employer was a "continuing retail supermarket operation" with respect to which A & p actually retains some interest.

36. In that respect, an A & P advertisement titled "Acquisition Opportunity" identifies the Miracle Mart store in question herein as one of nine stores to be sold "as single business entities or as a package, for the purpose of a continuing retail supermarket operation". In a related document which discloses various particulars of the store, including that the store will be "sold" on a sub-lease basis, it is stipulated that there is to be an operation covenant and that the use of the premises is restricted to that of a "first rate supermarket". Further, the sub-lease agreement executed by all interested parties, including the responding employer, stipulates that the latter is to "continue to carry on business in the manner required to be conducted ... pursuant to the provisions of [Head] Lease". The sub-lease agreement between A & P, through New Miracle Food Mart Inc., and the responding employer provides that the responding employer is leasing assets used by A & P in the operation of the retail grocery food store business subject to the Head Lease and on the terms and conditions as set out. This sub-lease agreement makes it clear that A & P retains ownership and ultimate control over the "equipment" (as defined in the agreement).

37. The terms of the Head Lease require that the store sub-let by A & P to the responding employer "... be continuously, actively and diligently operated, fully fixtured, stocked and staffed solely for the purpose of conducting the business of a first rate food supermarket, and for no other

or business purpose, all in accordance with the terms of the Head Lease, and only under the advertised name of Penny Lane Food Market Ltd. ...". The Head Lease also requires that:

ARTICLE X

Use of Premises

Section 10.01 Use of Premises

(a) The Tenant shall use the Leased Premises solely for the purpose of conducting the business of a first rate food supermarket operated in a manner similar to a majority of other food supermarkets of similar size operated by the Tenant in the Province of Ontario and the Tenant will not use or permit, or suffer the use of, the Leased Premises or any part or parts thereof for any other business or purpose. In connection with the business to be conducted by the Tenant on the Leased Premises, the Tenant shall only use the name "Steinberg's" or "Miracle Food Mart", or such other name as is used from time to time in a majority of the Tenant's other similar size stores in the Province of Ontario.

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Although it has been necessarily modified Consent to Sub-lease agreement, this provision also operates to restrict what the responding employer can do with the premises.

38. In the result, we are left with a retail food store owned and operated by the responding employer which was previously owned and operated, as a retail food store, by A & P under the Miracle Mart Banner. Its character and the nature of its business remains substantially the same and cannot be changed by the responding employer. The store was sub-let directly by A & P to the responding employer as the retail supermarket operation it was before. Even if the result could be said to be an expansion of the responding employer's existing business, it has been accomplished through an acquisition of part of A & P's business.

39. In the Board's view, the transaction between A & P and the responding employer in this case constitutes a sale of a business within the meaning of section 64 of the *Labour Relations Act*, and the applicant is entitled to the declarations it seeks in that respect.

40. We appreciate the concerns expressed by the representative of the group of employees which intervened in this proceeding. Section 64(8) did, and still does, provide that the Board may hold such representation votes as it considers appropriate before disposing of an application under section 64. However, given the purpose of section 64 (see paragraph 32, above), the Board considers that a sale of a business does not trigger a representation issue unless more than one trade union is involved (as for example, where one trade union represents affected employees of the vendor and another trade union represents affected employees of the purchaser) or there has been an "intermingling" within the meaning of section 64. In the result, the Board does not find this to be an appropriate case in which to hold a representation vote. (However, we do observe that it is always open to the affected employees to make an application which would directly trigger a representation issue in accordance with the provisions of the *Labour Relations Act*.)

41. With respect to the bargaining unit of employees which the applicant may be entitled to represent as a result of the sale of a business found herein, there was no suggestion that this description should do anything other than mirror the recognition clause in the collective agreement which had applied to employees of A & P's Miracle Mart store at the location in question. That collective agreement described that bargaining unit as follows:

1.01 The Employer recognizes the United Food and Commercial Workers International Union Local 175 as the sole and exclusive bargaining agency for all employees of Steinberg Inc. in its

retail food supermarkets in the Province of Ontario, but not including the Counties of Renfrew, Lanark, Carlton, Leeds, Grenville, Dundas, Stormont, Russell, Prescott and Glengarry, save and except Meat Department employees, Store Manager, persons above the rank of Store Manager, persons employed not more than twenty-four (24) hours per week and students employed in off-school hours and during school vacation periods. The Employer may appoint Assistant Store Managers in up to two-thirds (2/3) of its stores of their choice and the positions will be excluded from the bargaining unit. (When a new store opens, a discussion between the Union and the Employer will take place.)

1.02 The Employer recognizes the Local Union 633 as the sole and exclusive bargaining agency for all Meat Department employees of Steinberg Inc. in its retail food supermarkets in the Province of Ontario, but not including the Counties of Renfrew, Lanark, Carlton, Leeds, Grenville, Dundas, Stormont, Russell, Prescott and Glengarry, save and except part-time employees employed for not more than twenty-four (24) hours per week.

In our view, the remaining clauses in the so-called "recognition clause" of that collective agreement do not constitute a part of a bargaining unit description.

42. The applicant is not however entitled to the other relief it seeks. The sale of a business herein did not occur until August 11, 1992. It could have occurred earlier as argued by the applicant, but it did not. At the time of the sale there was no collective agreement in place and the applicant has never given notice to bargain to the responding employer (and the provisions of section 64(2.2) do not apply - see paragraphs 17-27 above). Accordingly, no section 81 freeze (which provisions remain unchanged from what they were prior to January 1, 1993) applies (see, for example, *New Holiday Tavern*, [1987] OLRB Rep. May 753; *Oxford Manor Rest Home*, *supra*). Nor is the responding employer subject to or in anyway bound by anything which has been negotiated between A & P and the applicant. Consequently, the responding employer is in no way bound by any collective agreement which has been or may be negotiated between A & P and the applicant.

43. In the result:

- (a) the Board declares that there has been a sale of a business, within the meaning of section 64 of the *Labour Relations Act*, from the Great Atlantic & Pacific Company of Canada, Limited to Penny Lane Food Markets Ltd.;
- (b) the Board declares that the United Food & Commercial Workers International Union Local 175 is the exclusive bargaining agent for all employees of Penny Lane Food Markets Ltd. in its retail food supermarkets in the Province of Ontario, but not including the Counties of Renfrew, Lanark, Carlton, Leeds, Grenville, Dundas, Stormont, Russell, Prescott and Glengarry, save and except Meat Department employees, Store Manager, persons above the rank of Store Manager, persons employed not more than twenty-four (24) hours per week and students employed in off-school hours and during the school vacation period. The Employer may appoint Assistant Store Managers in up to two-thirds (2/3) of its stores of its choice and the positions will be excluded from the bargaining unit. (When a new store opens, a discussion between the Union and the Employer will take place.);
- (c) the Board declares that United Food and Commercial Workers International Union Local 633 is the exclusive bargaining agent for all Meat Department employees of Penny Lane Food Markets Ltd.

in its retail food supermarkets in the Province of Ontario, but not including the Counties of Renfrew, Lanark, Carlton, Leeds, Grenville, Dundas, Stormont, Russell, Prescott and Glengarry, save and except part-time employees employed for not more than twenty-four (24) hours per week.

44. In the Board's view, no other declarations, directions or orders are necessary or appropriate.

45. We note that no part of the Board's declarations herein apply to the store operated by Penny Lane Fruit Market Inc. in Scarborough. The latter is a separate entity. It was not named as a party and the applicant sought nothing herein with respect to it. Nor were the employees of that store given any notice of this application or proceeding.

3207-92-M National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Reynolds-Lemmerz Industries, Responding Party

Interim Relief - Interference in Trade Unions - Practice and Procedure - Remedies - Unfair Labour Practice - Union alleging that employer interfering with organizing drive by posting and distributing certain letter to employees - Board considering whether complaint making out arguable case and also assessing relative harm of granting or withholding relief - Board aiming to preserve union's right to meaningful remedy, should complaint be upheld, while intruding as little as possible on employer's interests - Employer directed to remove letter from any area in which it was posted and to refrain from communication with employees involving counselling workers to resign union membership - Board's order effective until disposition or settlement of complaint

BEFORE: *S. Liang*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Michelle McPhee* and *Ben Guay* for the applicant; *David Corbett*, *Ray MacPherson* and *Jim Gray* for the responding party.

DECISION OF THE BOARD; March 15, 1993

1. This is an application for an interim order under section 92.1 of the Labour Relations Board. Section 92.1 reads:

92.1 On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

2. The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) ("the CAW" or "the union") has filed a complaint alleging that Reynolds-Lemmerz Industries ("the company" or "the employer") has violated sections 3, 65, 67 and 71 of the *Labour Relations Act*. Pending the hearing of this complaint, the union asks the Board to order interim relief. Essentially, the union's complaint is that, during an organizing drive, the company has intimidated employees and interfered with the organizing drive by distributing a letter to

all employees (by attaching it to pay envelopes) and posting this same letter in the workplace. The fact that a letter was so distributed and posted is not disputed by the company, although it rejects the union's characterization of its conduct in creating and distributing the letter. The company disputes that it has violated the Act. It states that it is not unusual for it to communicate with workers by enclosing letters with paycheques. Further, the company states that this particular letter was issued in response to inquiries from employees. It was not disputed that the union is conducting an organizing drive, which commenced in approximately October, 1989.

3. The content of the letter is as follows:

Jan 20/93

Reynolds - Lemmerz Industries

To All Reynolds-Lemmerz Industries' Employees:

It looks like the CAW is still active and pushing hard to sell you a membership into their shrinking union. Why not? It's their organizer's goal to get you to part with your money so he can keep getting paid, as well as all his co-workers who do not produce anything except **false hope**. Manufacturing jobs are being lost all over Ontario and Canada by Companies who are not profitable nor competitive. Reynolds-Lemmerz Industries, **Your Company**, is currently marginally profitable and competitive and working very hard to remain so.

Having reviewed the latest hand-out from the CAW on Volkswagen's wage rates which appear to be 20% higher than ours, I have done a simple calculation of increasing ours to match theirs and in doing this, can demonstrate that if we paid those wages over last years wage costs, we would have lost two and three quarter million dollars for the year. **We are not Volkswagen** nor do we have any other product line, such as catalytic converters, as they do, to offset their overhead costs. We manufacture wheels and that is the only source of our income.

Do not be fooled by misleading information from the CAW. Reynolds-Lemmerz Industries' management has fulfilled every one of our promises. We are doing our best, along with all of your efforts, to keep us on the right path to survive in these exceedingly tough times. We, as a Company, have captured all the work we can handle and our future looks very promising, as long as we continue to improve. We are operating well as a team, having overcome many problems in the past months and years. Please do not let the union propaganda machine cloud your vision of the future because we cannot pay money we do not have.

For those employees who have been asking how to get their cards back, they must send a letter to the CAW, **before** the date of application for certification has been filed, stating - "Dear Union: I, the undersigned, resign my membership in your union, effective immediately, and no longer wish to be represented by you. Please return my signed card to me." The employee would then sign and date this letter, making sure a return address is included and a copy of the letter must be kept. **Please note: sending the letter Registered mail or Priority Post will confirm that your letter has been received as these two postal systems require signatures upon receipt.**

1993 is a year that bring with it a lot of challenges, I know we will measure well against them.

"Ray"
Ray MacPherson

Posted: January 1993
Removed: April 1993

4. The union requests in this application the following interim relief:

- (i) A Declaration that the Respondent Reynolds-Lemmerz Industries has violated sections 3, 65, 67 and 71 of the Ontario *Labour Relations Act*;
- (ii) An Order that the Respondent Reynolds-Lemmerz Industries imme-

diately remove any and all copies of the letter marked as Appendix "A" to the Declaration of Ben Guay from the Respondent's production facility in Collingwood, Ontario;

- (iii) An Order that the Respondent Reynolds- Lemmerz Industries cease and desist from any further acts of intimidation or interference into the rights of its workers to join a union or into the Applicant union's representation of its members, such acts including, but not limited to, communicating in any fashion with its workers where such communication involves counselling the workers to resign their membership in the union.

5. At the hearing of this matter on February 10, 1992, the Board delivered the following unanimous oral ruling:

The Board issues the following interim order:

1. An order that Reynolds-Lemmerz remove from any area in which it has been posted in the workplace, the letter which is the subject of these proceedings.
2. An order that Reynolds-Lemmerz refrain from communicating with its workers where such communication involves counselling the workers to resign their membership in the union.

The Board declines to make any finding in this interim relief application as to whether the respondent has violated sections 3, 65, 67 and 71 of the *Act*.

6. This order is effective until the disposition or settlement of the complaint. We now provide our reasons for the ruling.

7. This panel did not consider it appropriate to make findings with respect to the merits of the complaint, as the applicant has requested. The matter came before us on an expedited basis and was argued on the basis of signed declarations. The parties have neither agreed that this panel should hear the complaint, nor agreed on the facts which constitute the basis of the complaint. In the absence of such agreement, it would be inappropriate for us to turn an expedited hearing with respect to a request for section 92.1 relief, into a hearing into the merits of the complaint. Accordingly, we decline to consider the request for a declaration of a violation of the *Act*.

8. In deciding the issue of interim relief, however, it is necessary for this panel to have some regard for the potential merits of the complaint. Interim relief is important to this applicant precisely because it serves to preserve rights pending the hearing of its complaint. It would be a distortion of the process if the Board granted such relief no matter how frivolous the complaint itself. The applicant urges the panel to find that it has established, at the least, a *prima facie* case. Counsel for the company suggests that the Board should look to see whether the applicant can show it is *likely* to succeed on merits of the complaint.

9. In our view, the complaint makes out an arguable case. We need not determine to what extent the complaint makes out a *strong* case, viewing it in its most favourable light. Simply put, it is plausible that a panel hearing it may find that the *Act* has been violated, and order a remedy. We note that there have been occasions where the Board has found letters from an employer to employees in the context of an organizing drive to constitute violations of the *Act*.

10. In this context, the goal of this panel's ruling is the preservation of the right of the union

to a meaningful remedy, should the complaint be upheld, while at the same time intruding as little as possible on the employer's interests.

11. Both counsel have submitted that the Board ought to look at the harm that would ensue to each of the parties' interests, should the Board grant or not grant interim relief (although they have used different terms, such as the "balance of convenience", or "significant harm" to describe the notion). We agree that the relative harm of granting or withholding relief is a relevant consideration. In our view, the harm to the union in this case relates to the adequacy of relief in the complaint. The allegations are that the letter, and the manner of its distribution, unduly influences employees in the exercise of their choice to join or not to join a union. If these allegations are proven, it will be difficult for the Board to order a remedy which truly places the union back in the position in which it would have found itself, but for the breach of the Act. By the time the complaint is adjudicated, there will be no returning to the point in the organizing drive prior to the actions of the company, particularly if they continue.

12. Counsel for the company suggests that any potential harm which results from the actions of the company can be completely remedied by the Board's inquiries into the voluntariness of petitions and revocations which may be filed. At that stage in the process, it is submitted, the Board has a factual context in which it can determine whether there has been undue influence by the company in the employees' decisions to join or not join the union. The issues raised by the applicant are better dealt with in that factual context than in the application for interim relief.

13. It does not appear to us that the Board's inquiries under section 8(7) of the Act are an answer to this application. Firstly, the applicant's allegations, among other things, are that the employer has unduly influenced *all* employees, not just those who have joined the union. Secondly, counsel's comments are equally applicable to the *complaint* by the union as much as this application for interim relief. It would completely undercut the protections found in sections 65, 67 and 71 of the Act if the Board were unable to provide a remedy outside of its inquiries under section 8(7).

14. We recognize that our order may have no remedying effect with respect to actions already taken. Nevertheless, they can serve to minimize the potential harm from this date forward and thereby enhance and complement the Board's remedial powers, should they be found necessary.

15. On the other hand, the interim orders which we have made are not very intrusive on the employer's interests. They preserve the general right of the company to communicate with its employees. Pending the hearing of the complaint, the company is simply constrained from communicating with its employees in one specific area. As well, pending the hearing of the complaint, the letter which is the subject of the complaint is to be removed from any place in which it has been posted in the workplace (although we have narrowed the order from that requested by the union, which could have included any copies contained in the company's files).

16. Since the hearing in this matter, another panel of the Board has released its decision in *810048 Ontario Limited c.o.b. as Loeb Highland*, Board File No. 2912-92-M [now reported at [1993] OLRB Rep. Mar. 197], the reasons for which we consider to be consistent with our findings herein.

3012-92-R United Steelworkers of America, Applicant v. Shrader Canada Limited, Responding Party v. Group of Employees, Objectors

Bargaining Unit - Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Petition - Board relying on section 8(4) of the Act and Rule 47 of the Rules of Procedure in declining to receive untimely employee evidence of objection - Employer and objecting employees raising allegations with respect to method of collection of memberships by union - Board declining to inquire into certain matters not sufficiently particularized and determining that other allegations not causing Board to doubt reliability of membership evidence - Board applying *Hospital for Sick Children* test and determining that employees of separate division or department properly falling within applied for bargaining unit - Interim certificate issuing

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. M. Sloan* and *E. G. Theobald*.

APPEARANCES: *Robert Healey* and *Omero Landi* for the applicant; *Guy Giorno* and *Anthony M. Speciale* for the responding party; *Don McGinnis*, *Leonard M. Jones*, *Don Sprague*, *Michael Cain*, *John Barker*, *Lynda Roper*, and *Ron Sonke* for the Objectors.

DECISION OF ROBERT HERMAN, VICE-CHAIR, AND BOARD MEMBER E. G. THEOBALD;
March 29, 1993

1. This is an application for certification. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
2. The employer, Shrader Canada Limited, filed written submissions, in which it objected to the method by which some of the memberships or applications for membership in the applicant union, the United Steelworkers of America, were obtained, alleging that some of the memberships were obtained through misrepresentation, intimidation, or coercion.
3. A number of employees filed written indications by the terminal date that they wish to participate in this proceeding. They appeared at the hearing and, as had the employer, raised allegations with respect to the method of collection of the memberships by the applicant. They also expressed numerous reasons for objecting to union representation. The Board orally ruled that it would not entertain the objections that were in the nature of objections to the union being certified. In this respect, section 8(4) of the Act reads as follows:

“ 8.-(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.”

4. Rule 47 of the Board's new Rules reads as follows:

47. Membership evidence, evidence of objection and evidence of re-affirmation will not be considered by the Board unless the evidence is filed by the application filing date, is in writing, signed by each employee concerned, and is accompanied by the name of the employer and the name, address, telephone number and facsimile number, if any, of a contact person.

5. As can be seen, evidence of objection must be filed with the Board on or before the application date in the particular proceeding. That was not done so here. Accordingly, to the extent that such objections or representations did deal with matters covered by section 8(4) of the Act, and Rule 47, they were not entertained by the Board. There is however, no requirement that allegations be filed by the application date with respect to matters that allege that memberships submitted by the union are not reliable. For this reason, the Board did entertain the allegations raised by the employer and employees at the hearing which sought to challenge the reliability of the membership evidence. In this respect, the employees were allowed a recess in order to particularize any further allegations they might have in this regard. The Board indicated to the employees prior to such recess that they would not be able to later raise matters which had not already been particularized in writing, or which were not put in writing during the recess. Again, the Board would consider only those matters which were not in the nature of objections to the union, or to becoming unionized.

6. With respect to the allegations alleging impropriety in the collection of the memberships, after hearing the parties' submissions, the Board provided its decision orally:

"The issue at this stage for the Board is whether the matters particularized in various documents, which are said to undercut the reliability of the membership evidence, are such or raise such matters that the Board ought to further inquire. In this respect, the Board has considered only those matters that have been particularized in writing, as any other matters have been raised too late.

There are two aspects to this issue. First, whether those matters which have been sufficiently particularized are of a nature, assuming them to be true, that the Board ought to further inquire into them or perhaps more accurately, ought to allow evidence to be led by the parties touching on these matters. Second, where the employer has failed to file sufficient particulars of certain matters, whether those allegations should nevertheless proceed.

Looking at all the particulars, the Board is not satisfied that these matters ought to proceed further, or that the Board ought to inquire further or hear evidence into any of them.

With respect to those matters that have been sufficiently particularized, they are not of a nature that would cause us concern with respect to whether the memberships collected and relied upon by the union are proper. A number of promises and statements were made during the organizing campaign; for example, with respect to raises that the union would be able to obtain after certification, and with respect to the union refusing to advise employees of the amount of dues that would be owing to the union. None of these reasons or facts however would cause us to doubt whether the memberships were reliable.

Similarly, with respect to the allegations that English is not the first language of some of the employees, and the further allegation that some of the employees did not understand perhaps what they signed in signing the membership cards, in our view this is not a reason to discount those cards. There is no specific suggestion that an employee did not realize what he or she was signing, even though it is alleged he or she was perhaps unable to read the card. And even if they had not understood everything in the card, there are no particulars suggesting that they signed unwillingly or were coerced in any manner.

Finally, we turn to the employer's argument that, if some of the allegations are insufficiently particularized, the Board ought nevertheless to hear evidence of those matters, given the diffi-

culty of an employer investigating and particularizing fully such concerns. With respect, we do not agree with counsel's submissions in this respect. If matters are not sufficiently particularized, then they will not be allowed to be further pursued. We note that the employees who were named in the particulars filed by the employer had full opportunity to raise these matters themselves, and they were in a position to have fully particularized them, had they so chosen. They did not however do so. We are not referring here to the employees who have appeared before the Board today, but to those other employees who are named in the employer's particulars.

Further, with respect to those particulars that have been provided by the employer (for example, with respect to Gonzalez), they have not been sufficiently particularized. While we recognize that the employer has limitations on its ability to investigate when it hears of potential problems with how a union obtained its membership evidence, there is good reason for this. The *Labour Relations Act* in effect tells employers not to interfere in organizing campaigns. Since the employees themselves can raise any concerns they might have of this nature, there is no reason to grant to an employer additional leeway, as is requested here, to enable it to cause an inquiry to be made in the absence of sufficient particulars.

In summary therefore, we are not going to pursue these matters further, since they have not been sufficiently particularized or alternatively, since they do not raise matters of sufficient concern.

7. The Board turned next to the issue of the appropriate bargaining unit. The employees who had participated in the issue of the sufficiency of the memberships chose not to participate in the bargaining unit description dispute.

8. The bargaining unit requested by the applicant can generally be considered a plant or production bargaining unit, described more particularly as consisting of "all employees of Shrader Canada Limited in the Towns of Oakville, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff". The parties were agreed on this general description, subject to seven items in dispute.

9. First, the parties were in dispute over whether "production facilitators" were "supervisors", or persons above the level of "supervisor", with the applicant asserting that such people were not supervisors, and ought to be included in the bargaining unit.

10. Second, the parties were in dispute over whether "supervisor trainees" ought to be included in the excluded "supervisor" category, with the employer asserting that such trainees should be treated as supervisors and excluded.

11. The third, fourth, and fifth disputes all revolve around whether certain positions fall within the "technical" exclusion, and therefore ought to be excluded. The employer asserts that engineers, blender, and quality control people all ought to be treated as technical employees, and therefore excluded from the bargaining unit.

12. Sixth, the parties were in dispute over whether the "office custodian" ought to be excluded on community of interest grounds, with the applicant asserting that such positions ought to be included in the bargaining unit, and with the employer taking the contrary position.

13. Seventh, part of the company's business was performed under a division set up by the company and known as Shrader/Malcolm Chemical Warehousing and Distribution Division ("Shrader/Malcolm"). The company asserted that this division ought to be excluded from the bargaining unit, and the applicant asserted that employees of Shrader/Malcolm ought to be included.

14. In making submissions, the parties were able to agree on a significant number of facts with respect to these disputed items. After hearing the parties' submissions, and in light of certain

comments made by the Board, the parties were agreed that the Board could rule upon the disputes forthwith with respect to production facilitator, supervisor trainee, engineering, blender, and quality control. Accordingly, as ruled orally at the hearing, the Board finds that neither the production facilitator nor the supervisor trainees constitute supervisors, and accordingly both categories of positions are to be included within the bargaining unit. The Board also ruled that engineers did not fall within the technical exclusion, and accordingly engineers as well ought to be included within the bargaining unit. The Board further ruled that both the blender and quality control positions did properly fall within the category of technical employees, and that employees in those two positions were to be excluded from the bargaining unit.

15. This left two issues remaining in dispute, the position of the office custodian, and whether the employees of Shrader/Malcolm ought to be included or excluded from the bargaining unit. At that stage of the hearing and the application however, the union was in a position to receive an interim certificate, as it appeared that the union had sufficient number of memberships that, regardless of the outcome of the two remaining disputes, it would be automatically certified. Prior to granting the interim certificate and appointing a Board Officer to inquire into the two remaining issues, the parties both asked the Board to deal forthwith with the dispute over the inclusion or exclusion of the Shrader/Malcolm employees. The parties were able to agree on the facts for purposes of this issue, and it was apparent that the submissions on that dispute could be dealt with on that same hearing date. In contrast however, there was no agreement between the parties that the Board ought to deal with the office custodian issue dispute, and it was apparent that evidence would have to be heard to resolve the factual disputes with respect to the duties and responsibilities of the office custodian. The Board therefore ruled that an interim certificate would issue, that the Board would deal that day with the dispute with respect to the Shrader/Malcolm employees, but that a Board Officer would be appointed with respect to the dispute over the office custodian.

16. Before turning to the Shrader/Malcolm issue, we would comment briefly on the dispute over the office custodian. In order to decide this issue, we must determine whether the office custodian has duties and responsibilities in the plant part of the building, other than duties relating to his membership on the plant Health and Safety Committee. To the extent that the office custodian has little or no such official duties and responsibilities in the plant or production area, then it becomes less likely that the Board will include such an individual in the bargaining unit. However, the parties have not yet had full opportunity to argue this issue.

17. As noted, the facts relevant to the Shrader/Malcolm dispute were agreed. Since approximately 1953 or 1954, Shrader Canada Limited has been in the business of manufacturing petrochemical products for use in the automotive industry. Shrader would manufacture and blend the chemicals and Shrader's customers would arrange to pick up the chemicals from the Shrader plant. At present, Shrader has approximately fifty to sixty customers of this sort, international in scope.

18. The bargaining unit in question covers the plant or production employees, and as such includes employees of Shrader who operate the forklifts, who receive, move and store chemicals, and who later ship out the chemicals. The bargaining unit also includes employees who manufacture chemicals.

19. Sometime before September, 1992, Shrader was approached by one of its main customers, Ford Motor Company of Canada, with the inquiry as to whether Shrader was interested in being responsible for the receipt, storage, and distribution of chemicals on behalf of Ford, to be used by Ford's dealers or agencies throughout Canada. Previously, Ford had distributed chemicals to its agencies itself, but now was looking for an independent company to perform this storage and

distribution service. It was agreed that Ford would ship the chemicals to Shrader, already in unit (as opposed to bulk) packaging, which Shrader would then store and subsequently distribute across Canada to the various Ford agencies, approximately six hundred in number. Shrader was not required to manufacture, blend, or package these Ford destined chemicals.

20. In order to provide this contractual service for Ford, Shrader caused a new department or division to be set up, and it registered the name "Shrader/Malcolm", acquiring proprietary right in that name. No new corporate entity was created, and there is no dispute that Shrader Canada Limited itself remains the only legal entity or employer. Shrader also arranged to have an existing part of the plant area cordoned off with a chain link fence, with the work of Shrader/Malcolm being almost entirely performed within the boundaries of the fenced-off area. The fenced-off area has a separate door, although Shrader/Malcolm employees are not required to use only that door. One of the pre-existing shipping bays of Shrader, also in the cordoned-off area, has been designated to be used in the future exclusively for the Shrader/Malcolm (that is, the Ford) part of the business. Shrader caused special tracks to be laid in the fenced-off area which are required for a particular tow motor. Ford's material is stored within the area, and for the most part shipped out from this area.

21. Shrader hired a separate workforce for its Shrader/Malcolm division, which at the time of the application consisted of three employees who would otherwise fall within the bargaining unit description. One of the three came from the pre-existing Shrader employee complement. The chemical product is received and packaged at the Shrader/Malcolm shipping bay, by Shrader/Malcolm employees, and is for the most part stored in the Shrader/Malcolm fenced-off area within the larger Shrader plant. The product is subsequently distributed to the dealers through pick-ups by third party shippers (e.g. Purolator) at the Shrader/Malcolm shipping bay.

22. Although most of the chemicals handled by Shrader/Malcolm have been shipped to it by Ford, approximately 18% of the Shrader/Malcolm product is produced by Shrader itself, in the non-cordoned off plant area. These chemicals are also shipped out by Shrader/Malcolm to the Ford agencies.

23. As indicated, the company uses the proprietary name of Shrader/Malcolm. Shrader/Malcolm has its own letterhead and phone number, although the phone is answered by the Shrader receptionist.

24. The Shrader/Malcolm Manager reports to the Assistant General Manager of Shrader, as do the Managers of other Shrader departments. Shrader Canada Limited remains the only legal entity or employer. Shrader/Malcolm's payroll is entered through the Shrader books, although debits and credits are noted to reflect the payment to Shrader/Malcolm employees. Pay cheques for Shrader/Malcolm employees use the Shrader/Malcolm proprietary name. Shrader/Malcolm has its own secretarial complement. Although the Boards of Directors of Shrader Canada Limited and Shrader/Malcolm are not identical, they share the same controlling director.

25. There are similarities between the duties and responsibilities of the three production or plant employees of Shrader/Malcolm and those of Shrader. Both groups of employees are required to drive tow motors or forklifts. Both groups are hourly rated, both use the same punch-clock system and the same punch-clock. Both groups eat in the same lunch-room, although the Board was advised that the Shrader/Malcolm employees eat in a segregated group. In terms of the actual duties and responsibilities of the two groups, both are involved in the moving and storage of petrochemicals for shipment.

26. When Shrader/Malcolm first began to operate, for a weekend or two it was necessary

for Shrader to arrange for a Shrader employee or two to assist in the Shrader/Malcolm operation. Other than this very limited interchange of employees, at the beginning, Shrader/Malcolm has maintained a separate employee complement with no interchange.

27. We do not propose to recite the law with respect to the approach the Board brings to the determination of the appropriate bargaining unit. The Board has written on many occasions on this issue, and the parties are quite familiar with the approach taken by the Board. Succinctly put, we consider the appropriate approach to be that as described in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, where the Board characterized the issue as follows; does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?

28. Returning to the facts, although the employer asserted that the skills of the employees were different, as the forklifts and tow-motors were of a different nature for the Shrader/Malcolm work, we have no real evidence to this effect. To the contrary, the more logical inference, based upon the agreed facts, is that the skills are relatively similar for employees driving machines for either division. Similarly, we have no evidence that the working conditions of employees are meaningfully different in any respect, nor that the nature of what they do during a typical day is meaningfully different. We do not consider it significant that the goods that are being moved within the plant and subsequently shipped out are pre-packaged in units (for the most part) for the Shrader/Malcolm customer but are packaged in bulk for the Shrader customer. It appears as if the employees are engaged in essentially similar jobs under similar working conditions. The Shrader/Malcolm division reports to the same Shrader Assistant General Manager as do other departments of Shrader's. Both workforces are within the same physical plant, adjacent to each other, albeit separated by a chain link fence. There is no evidence of any different needs or interests of the two groups of employees.

29. In short, we are satisfied that including the Shrader/Malcolm employees in the bargaining unit would mean including a group which has a sufficiently coherent community of interest with the Shrader plant employees such that they can bargain together on a viable basis. Indeed, the two groups do not appear to be meaningfully distinguishable.

30. Are there any serious labour relations problems that such inclusion would cause for the employer? It was argued that since Shrader/Malcolm is a new business, it requires the flexibility that being unionized would not allow, or that being in the same bargaining unit as other employees would not allow. Even if this were a relevant factor, Shrader itself made the decision to administratively set up the Shrader/Malcolm division in a manner similar to other Shrader departments included in the bargaining unit, accountable through the Shrader reporting hierarchy, paid out of the Shrader payroll. Further, there is no evidence suggesting how flexibility might be meaningfully hampered should these three employees be included in the bargaining unit sought by the applicant. Shrader is still fully able to keep the product lines separate, to the extent that it chooses. Shrader will still be able to hire and direct employees that meet its needs and that have the requisite skills.

31. Both parties addressed whether problems might result if a strike should occur in the production bargaining unit. The employer was concerned that the inclusion of the Shrader/Malcolm employees, should the production unit strike, would effectively prevent the company from honouring its contract with Ford. While this may be true, it is no reason to find inappropriate a bargaining unit that appears in all other respects to be appropriate. If the bargaining unit were too small, so that it would cause undue fragmentation of the workforce, then there would be more force to the employer's argument. An unduly fragmented workplace might lead to an unend-

ing cycle of strikes, which would be of serious concern. But that is not the case here. This applicant here seeks the *larger* unit. Granting this unit will reduce fragmentation, albeit with the potential for greater bargaining strength to the union. But unless the unit sought is so small as to not be viable, the Board does not try to redress bargaining strengths in determining the appropriate bargaining unit. We are not disposed to find a bargaining unit inappropriate so that an employer can better withstand the potential negative impact of a strike.

32. In the result, the Board is not satisfied that there will be any serious labour relations problems that will occur because the bargaining unit includes the Shrader/Malcolm employees. The facts simply do not establish that Shrader/Malcolm is effectively a separate business, with its employees having little community of interest with the other production employees. Had we been so satisfied, we might well have decided otherwise. To the contrary, what has occurred here is really an accommodation by Shrader of the needs of a special and valued customer, rather than the creation of a new business. Shrader has used a new proprietary name, and fenced off a part of its existing plant floor space, in order to serve the needs of Ford, and presumably to do so in a more efficient and effective manner. But this is not an entirely new business, distinct in some meaningful sense, from the Shrader business. It remains the same business Shrader was in before and that it continues to engage in, and one which has employees performing work similar to and under similar conditions as employees in the bargaining unit. The change of name and the new fence do not change this conclusion.

33. For these reasons, we are satisfied that the employees of Shrader/Malcolm fall within the applied for bargaining unit.

34. On the basis of all the evidence, the Board is satisfied that, regardless of the resolution of the remaining dispute over the office custodian, more than fifty-five per cent of the employees of the respondent in the bargaining unit, as of the application date, were members of the applicant. Accordingly, pursuant to section 6(2) of the Act, the Board certifies the applicant as bargaining agent for:

“all employees of Shrader Canada Limited in the town of Oakville, save and except supervisors, persons above the rank of supervisors, office, clerical, technical and sales staff.”

Clarity Note No. 1

Technical stall includes laboratory and quality control staff, and blender.

Clarity Note No. 2

It is agreed that the production team leaders are supervisors.

Clarity Note No. 3

The employees of Shrader/Malcolm falling within the appropriate classifications are included in the bargaining unit.

35. Pending the Board's determination or the parties' agreement, the position of office custodian will remain excluded from the bargaining unit.

36. A Board Officer is hereby appointed to inquire into and report back to the Board with respect to the dispute of office custodian. After receipt of the Board Officer's Report, the parties are directed to make written submissions, should they so choose, with respect to the Report and the conclusions the Board ought to draw based upon it. The Board does not see any need for a fur-

ther hearing to deal with the office custodian dispute, and is satisfied it could be adequately dealt with on the basis of the written submissions from the parties.

37. This remaining dispute over the office custodian will be dealt with by the instant panel.

38. A final certificate must await the final determination of the appropriate bargaining unit.

DECISION OF BOARD MEMBER R. M. SLOAN; March 29, 1993

1. I dissent from the majority decision with respect to the issue of the Shrader/Malcolm employees.

2. It is clear to me, and the reasoning in the majority decision does nothing to change this, that from the outset, the Shrader/Malcolm business initiated, was conceived and established by Shrader Canada Limited as a separate distinct entity which was fully distinguishable and independent of the functions then being performed at the Shrader Canada Manufacturing Location.

3. The uniqueness (and separateness) of the Shrader/Malcolm operation is obvious if we look at the following:

a) *Its origin* - The business was set up at the request of a customer, Ford Motor Company of Canada, to handle functions described in paragraph 19 of the majority decision.

b) *Its function* - the business deals almost exclusively with the prime function for which it was established and is not integrated in any significant operating way with the previous operation.

- The product line and the fact that there is no manufacturing or product is a further significantly distinguishing feature.

c) *Its staff* - the staff at Shrader/Malcolm is separate and distinct and operates independently from the manufacturing business.

d) *Its goals* - The Shrader/Malcolm business is a separate profit centre set up to deal exclusively with a business that is not, and was never intended to be, part of the manufacturing business.

4. I agree with the majority when they state in paragraph 32 that the name of the business and the new fence are not, in themselves, of such significance as to influence judgement in this matter.

5. Of determinative significance however, is the purpose for which the Shrader/Malcolm business was established and its complete operating independence from the manufacturing business. It is clear that in the absence of the manufacturing business Shrader/Malcolm could operate quite independently.

6. Which leads directly into significant labour relations problems - the majority decision effectively transfers any and all such problems that emanate from the manufacturing business to the separate and distinct Shrader/Malcolm business.

7. The effect which in my view places an undue and unfair burden upon Shrader Canada's abilities to meet its original intent to operate a separate and distinct business.

8. I find, without reservation, that for purposes of the *Labour Relations Act* Shrader/Malcolm is a separate and distinct business and should not be combined with the manufacturing business for collective bargaining purposes.

3438-92-M United Steelworkers of America, Applicant v. Tate Andale Canada Inc., Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Board directing employer to reinstate employees on an interim basis pending disposition of their unfair labour practice discharge complaint - Employer also directed to post Board notice in workplace and to provide copies of notice to employees affected by union's certification application

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *Robert Healey* for the applicant; *John W. Woon*, *Brian McBain* and *Brian Boucher* for the responding party.

DECISION OF THE BOARD; March 2, 1993

1. The Board hereby directs that Tate Andale Canada Inc. forthwith reinstate Heath Sweetman and Rod Cake, *on an interim basis*, pending the final disposition of their unfair labour practice discharge complaint in Board File 3437-92-U.
 2. The Board further directs Tate Andale Canada Inc. to post the notice attached as Appendix "A" in prominent places in the workplace, where it is most likely to be seen by employees interested in these proceedings. The company is also directed to provide a copy of this notice to all employees affected by the union's certification application, Board File 3402-92-R.
 3. Formal reasons for these decisions and directions will issue in due course.
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Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES**Posted by Order of the Ontario Labour Relations Board**

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH A DIRECTION OF THE BOARD, ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO MAKE SUBMISSIONS.

THE BOARD HAS ORDERED TATE ANDALE CANADA INC. TO REINSTATE HEATH SWEETHAN AND ROD CAKE ON AN INTERIM BASIS UNTIL THE BOARD CONSIDERS THE REASON FOR THEIR DISCHARGE. A HEARING BEFORE THE BOARD IS SCHEDULED TO BEGIN ON MARCH 11, 1993. THE PURPOSE OF THAT HEARING IS TO DETERMINE WHY HEATH SWEETHAN AND ROD CAKE WERE DISCHARGED.

IF THE BOARD ULTIMATELY DETERMINES THAT HEATH SWEETHAN AND ROD CAKE WERE DISCHARGED FOR MISCONDUCT OR POOR WORK PERFORMANCE, AND THEIR SUPPORT FOR THE UNION HAD NOTHING TO DO WITH IT, THE TEMPORARY REINSTATEMENT ORDER WILL BE REVOKED, AND THE COMPANY WILL NO LONGER BE REQUIRED TO EMPLOY THEM.

IF THE BOARD ULTIMATELY FINDS THAT THEIR DISCHARGE OCCURRED BECAUSE THEY WERE UNION SUPPORTERS, EXERCISING THEIR RIGHTS UNDER THE LABOUR RELATIONS ACT, THE BOARD MAY CONFIRM THEIR REINSTATEMENT, AND DIRECT THAT THEY BE COMPENSATED FOR ALL EARNINGS AND BENEFITS LOST AS A RESULT OF THEIR DISCHARGE.

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH ARE PROTECTED BY LAW:

AN EMPLOYEE HAS THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER OWN CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

AN EMPLOYEE HAS THE RIGHT TO OPPOSE A TRADE UNION, OR SUBJECT TO THE UNION SECURITY CLAUSE IN THE COLLECTIVE AGREEMENT WITH HIS OR HER EMPLOYER, REFUSE TO JOIN A TRADE UNION.

AN EMPLOYEE HAS THE RIGHT TO CAST A SECRET BALLOT IN FAVOUR OF, OR IN OPPOSITION TO, A TRADE UNION IF THE ONTARIO LABOUR RELATIONS BOARD DIRECTS A REPRESENTATION VOTE.

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED BY AN EMPLOYER OR BY A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT TO REMAIN NEUTRAL, TO REFUSE TO SIGN DOCUMENTS OPPOSING THE UNION OR TO REFUSE TO SIGN A UNION MEMBERSHIP CARD.

IT IS UNLAWFUL FOR EMPLOYEES TO BE FIRED OR IN ANY WAY PENALIZED FOR THE EXERCISE OF THESE RIGHTS. IF THIS HAPPENS, A COMPLAINT MAY BE FILED WITH THE ONTARIO LABOUR RELATIONS BOARD.

IT IS UNLAWFUL FOR ANYONE TO USE INTIMIDATION TO COMPEL SOMEONE ELSE TO BECOME OR REFRAIN FROM BECOMING A MEMBER OF A TRADE UNION, OR TO COMPEL SOMEONE TO REFRAIN FROM EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

TATE ANDALE CANADA INC.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 2ND day of MARCH, 1993

0013-90-JD Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers International Association, Local 539, Complainants v. **Vic West Steel**, United Brotherhood of Carpenters and Joiners of America, Local 1256, Responding Parties v. Ontario Sheet Metal and Air Handling Group, Intervenor

Adjournment - Evidence - Jurisdictional Dispute - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Redshaw*.

APPEARANCES: *S.B.D. Wahl*, *J. Raso*, *G. Ward* and *L. Dicker* for the Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers' International Association; *T. K. Billings*, *Fred Heerema* and *M. Bolton* for *Vic West Steel*; *Kevin Banks* (on May 22, 1991), *N. L. Jesin* and *Ron Carlton* for United Brotherhood of Carpenters and Joiners of America, Local 1256; *Fred Heerema*, *T. K. Billings* and *B. Gardner* for the Ontario Sheet Metal and Air Handling Group.

DECISION OF THE BOARD; March 23, 1993

I - INTRODUCTION

1. This complaint concerning work assignment was made and litigated under section 93 of the Labour Relations Act as it was prior to January 1, 1993. It was filed on April 2, 1990 by the Ontario Sheet Metal Workers and Roofers Conference, and the Sheet Metal Workers International Association, Local 539 (hereinafter jointly referred to as the "Sheet Metal Workers") in response to a grievance by the United Brotherhood of Carpenters and Joiners of America, Local 1256 (the "Carpenters") with respect to certain work performed by members of the Sheet Metal Workers for Vic West Steel ("Vic West"). In effect, the Carpenters grieved that the work in question ought to have been assigned to its members.

2. The complaint meandered through an excruciating pre-hearing and hearing process which did not conclude until some two years and eight months after it was filed. The course it followed was a difficult and sometimes frustrating one for the hearing panel, and we suspect for the parties as well. In many ways, it stands as a testament to much of what was wrong with the jurisdictional dispute process as it was prior to January 1, 1993.

3. In the course of the hearing of this complaint, the Board was required to make a number of significant rulings relating to the conduct of the proceedings. Normally, we would recount

these first. However, in this case, we find it appropriate to deal first with the merits and the disposition of the complaint and then set out those rulings.

II - Merits and Disposition

4. The work in dispute in this complaint is the work in connection with the off-loading, handling, distribution, site transport, rigging, erection and installation or application of sheet metal siding at the Loeb IGA store on Exmouth Street in Sarnia.

5. As a result of a concession by the Carpenters earlier on in the proceedings, the litigation of the complaint was more narrowly focused; namely, on the work in connection with the off-loading, handling, distribution, site transport, rigging, erection and installation or application of sheet metal siding *onto wood* at the Loeb IGA store on Exmouth Street in Sarnia.

6. In complaints concerning work assignments, the Board generally considers the factors first set out in *Canada Millwrights Ltd.*, [1967] OLRB Rep. May 195. These factors have since been summarized in the jurisprudence as follows:

- collective bargaining relationships
- skill and training
- economy and efficiency
- employer practice and preference
- area practice.

As the decided cases demonstrate, this is not an exhaustive list. It is neither possible to make an exhaustive list, nor appropriate to mechanically apply some formula or list of factors to a jurisdictional dispute complaint. Instead, the Board considers whatever factors are relevant to the particular dispute before it, which may include some or all of the factors listed above, or others which are not. Further, some of the five factors listed above will be of little assistance in any given case. In recent years, for example, the jurisdictions asserted by various trade unions in their collective agreements (or constitutions) have become so broad that little weight can be given to them. Because of this, the historical development of the division of labour in the construction industry on a craft or trade basis, and the increasing overlap between trades and the jurisdictions which they assert, the Board has recognized that collective bargaining relationships cannot, by themselves, be determinative of a jurisdictional dispute complaint. Consequently, while a trade union which has no collective agreement with the employer which assigned the work in dispute may have a difficult time in having the assignment altered, a trade union which has a collective agreement with the employer which made the assignment will not necessarily be successful in fending off a claim for such work by a trade union which does not a collective bargaining relationship with that employer (see, for example, *Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143, *Pigott Construction Limited*, [1992] OLRB Rep. June 748 ("*Pigott II*"). On the other hand, a single factor may be determinative of a jurisdictional dispute complaint. Work jurisdiction agreements provide one example (see *Pigott Construction Limited*, *supra*). In some cases, area practice will be determinative (*Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775; *Acco Canadian Material Handling*, [1992] OLRB Rep. May 537), although in other cases the Board has awarded the work in dispute to the trade union which that factor did not favour (see, for example, *Simcoe Mechanical Contracting Ltd.*, [1982] OLRB Rep. Sept. 1352; *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185). In recent years, area practice has become a dominant factor in terms of the time and energy devoted to it in jurisdictional dispute proceedings. This complaint was no exception. The parties devoted the bulk of their time during the hearing to exploring the area practice relating to the installation of sheet metal siding in Lambton County.

7. It seems counter intuitive to suggest that someone other than a sheet metal worker should install sheet metal siding. On its face, such work is at the very core of the Sheet Metal Workers' trade jurisdiction. In our view, it would take a clear trade agreement, or compelling economy and efficiency, or evidence of a well defined and virtually invariable area practice to cause the Board to conclude that the installation of sheet metal siding should be assigned to other than Sheet Metal Workers.

8. In this case, there is nothing, either in the traditional factors considered by the Board or otherwise, which favours an assignment of the work in dispute to members of the Carpenters.

9. The jurisdictional claims in the applicable collective agreements and in the two trade unions' constitutions favour neither one. However, the Sheet Metal Workers' inherent jurisdictional claim is the stronger of the two. In these circumstances, the nature of the material being installed is much more important than the base onto which it is installed.

10. With the exception of one anomalous assignment, Vic West's invariable practice has been to assign all work associated with the installation of sheet metal siding, regardless of the base it is applied to, to members of the Sheet Metal Workers. This is so whether or not the practice of Lorlea Steel Limited (acquired by Vic West in September 1987 and which the Carpenters submitted should not be considered as part of Vic West's practice herein) is included as part of Vic West's practice. This practice also demonstrates the employers preference in this case.

11. The evidence suggests that at the basic level, members of both the Carpenters and the Sheet Metal Workers have the necessary skill and ability to perform the work in dispute. To the extent that the requisite training is a normal part of the training of the members of the Sheet Metal Workers, while members of the Carpenters appear to require some special additional training, this factor very slightly favours the Sheet Metal Workers.

12. Although the estimates varied from roughly 2% to 15%, the evidence suggests that roughly 10% or less of the sheet metal siding installed in Lambton County is applied onto wood. Further, the evidence suggests that wood is rarely, if ever, the only base. Generally, as on the job in question herein, a smaller percentage of the base is wood with the dominant percentage being some other material, generally steel (in this case 30% of the sheet metal siding installed onto the Loeb IGA store was applied to wood and the remaining 70% was applied to steel). We are satisfied that it would make little practical sense to require an employer to either change the assignment according to the base to which the sheet metal siding is being applied, or to assign it to a composite crew consisting of variable numbers of sheet metal workers' and carpenters' depending on the percentages of different kinds of bases. In our view, the factor of economy and efficiency favours the jurisdictional claim of the Sheet Metal Workers.

13. The area practice evidence before the Board indicates that members of the Sheet Metal Workers and members of the Carpenters have both performed the work in dispute in Lambton County, generally in accordance with particular predilection of the employer assigning the work. We note that even if the Carpenters' area practice evidence which the Board declined to receive (see paragraphs 30-58, *infra*) had been received, it would have done nothing more than confirm this. The evidence does not substantiate the Carpenters assertion that there was a Lambton County practice pursuant to which members of the Sheet Metal Workers install sheet metal siding onto steel and members of the Carpenters install it onto wood. Though such a division of work seems to be given much lip service, particularly at the Sarnia Construction Association, it does not in fact exist, either at or through the Sarnia Construction Association, or otherwise. Indeed, it seems that employers which profess that there is such a division of work generally ignore both this alleged "practice" and any attempts by the Sarnia Construction Association to have it applied. On the evi-

dence before the Board, there is no readily definable area practice with respect to the work in dispute. Perhaps that is the crux of the problem.

14. In the result, there is nothing before the Board which suggests that the work in dispute herein should have been assigned to members of the Carpenters, and we see no reason to disturb the assignment made by Vic West in that respect.

15. In argument, counsel for the Sheet Metal Workers submitted that the Board should grant all of the relief sought by the Sheet Metal Workers in their Brief. The Carpenters submitted, in response to this argument (its primary submission being that the work in dispute was its work) that any Board order or decision should be limited to the work in dispute as litigated.

16. In their Brief, the Sheet Metal Workers requested the following orders:

- (a) an Order confirming the assignment by Vic West Steel of:

All work in connection with the offloading, handling, distribution, site transport, rigging and installation of sheet metal siding at the Loeb IGA Store, Exmouth Street, Sarnia, Ontario,

to members of the Ontario Sheet Metal Workers and Roofers Conference and Sheet Metal Workers International Association, Local 539.

- (b) an Order that all general contractors, including but not limited to, Aries Construction bound by the Carpenters' Provincial Agreement may properly and lawfully subcontract,

All work in connection with the offloading, handling, distribution, site transport, rigging and installation of sheet metal siding, throughout the County of Lambton (O.L.R.B. Geographic Area 2) to subcontractors who are not bound by the Carpenters' Provincial Agreement and in particular, to subcontractors bound by the Sheet Metal Workers' Provincial Agreement.

- (c) an Order that contractors bound by the Sheet Metal Workers Provincial Agreement assign and person,

all work in connection with offloading, handling, distribution, site transport, rigging and installation of sheet metal siding,

throughout the County of Lambton (O.L.R.B. Geographic Area 2) with members of the Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers International Association, Local 539.

17. In their Briefs and throughout this proceeding, the Sheet Metal Workers and Vic West agreed that the work in dispute herein is work in connection with the off-loading, handling, distribution, site transport, rigging and installation (or application) of sheet metal siding at the Loeb IGA Store on Exmouth Street in Sarnia. In its Brief, the Carpenters described the work in dispute as:

"... all work in connection with the off-loading, handling, distribution, site transport, rigging, erection, installation and application of siding fastened to wood..."

18. Both (implicitly) in its Brief, and subsequently (explicitly) at the hearing on May 22, 1991 (see paragraph

25, *infra*), the Carpenters conceded that the work in connection with the installation of sheet metal

siding onto a base other than wood (in this case steel) at the Loeb IGA store on Exmouth Street in Sarnia had been properly assigned by Vic West to members of the Sheet Metal Workers.

19. While the actual litigation herein was limited to work in connection with the installation of sheet metal siding onto wood, the complaint as a whole was not so limited. We note that the Carpenters did try to “clarify” its concession by stating that it did not concede jurisdiction with respect to sheet metal siding fastened to a base other than wood other than for purposes of this complaint. We are also aware that there are other jurisdictional dispute complaints concerning the installation of sheet metal siding presently before the Board.

20. In that context, and having regard to the evidence and representations of the parties, the Board finds it appropriate to confirm the assignment by Vic West Steel of all the work with respect to which this complaint was made; namely, *all* work in connection with the off-loading, distribution, site transport, rigging and installation of sheet metal siding, regardless of the base to which the siding was applied, at the Loeb IGA Store, Exmouth Street, Sarnia, Ontario, to members of the Sheet Metal Workers.

21. Further, the Board finds it appropriate to declare that Vic West Steel did not breach the Carpenters Provincial Agreement to which it is bound by assigning the said work to members of the Sheet Metal Workers, and further that any such future assignment by Vic West Steel in Lambton County will not constitute a breach of the Carpenters Provincial Agreement either.

22. This decision shall be binding on the parties for all other jobs in existence on the date hereof or undertaken in the future in Board Area No. 2 (Lambton County).

23. In our view, no other declarations, directions or orders are appropriate.

24. We turn now to a review of various determinations made in the course of this proceeding.

III - Defining the Work in Dispute and Focusing the Litigation

25. At the *hearing* (not a pre-hearing as it was referred to in some of the subsequent correspondence) held on May 22, 1991, the Board ruled on a number of preliminary matters. In a written decision issued on May 29, 1991, the Board set out its rulings in that respect as follows:

2. At the hearing, the United Brotherhood of Carpenters and Joiners of America, Local 1256 (the “Carpenters”) conceded that the work in connection with the off-loading, handling, distribution, site transport, rigging, erection, installation and application of siding fastened to metal was properly assigned by the respondent Vic West Steel to members of the complainant. The Carpenters claim only that work in connection with the off-loading, handling, distribution, site transport, rigging, erection, installation and application of siding fastened to wood should have been assigned to its members. Consequently, this complaint concerns only that latter work.

3. Further, having regard to the representations and agreements of the parties at the hearing, the Board determined that:

- a) subject to argument with respect to the issue of damages (if any), the project to which this complaint relates includes the Loeb IGA store and the other buildings in the “retail strip” that that store is located in on Exmouth Street in Sarnia where the work in dispute herein was performed;
- b) without prejudice to the Carpenters right to argue, at the conclusion of the evidence, that evidence with respect to the past practice of Lorlea Steels Limited is irrelevant or should be given no weight, the evidence regarding

the practice of assigning work of Westeel-Rosco, Jannock Limited, Victoria Metal Corporation, and Lorlea Steels Limited, as well as that of the Vic West Steel, will be admissible with respect to the issue of employer practice;

- c) the scope of the evidence admissible with respect to the issue of employer practice will be all sectors of the construction industry in the Province of Ontario;
- d) evidence with respect to the issue of area practice will be limited to Board Area 2, but not limited by sector (i.e. evidence with respect to all sectors of the construction industry in Board Area 2 will be admissible); and
- e) the respondent, Vic West Steel, and the intervener, Ontario Sheet Metal and Air Handling Group, will present their evidence first.

26. On August 26, 1991, the first day of hearing scheduled with respect to the actual merits of the complaint, the Carpenters sought reconsideration of paragraph 2 of the May 29, 1991 decision as aforesaid. The Carpenters submitted that it had not conceded that all work in connection with the off-loading, handling, distribution, site transport, rigging, erection, installation and application of sheet metal siding fastened to metal had been properly assigned to members of the Sheet Metal Workers.

27. The Carpenters' submission was inaccurate. The Carpenters had quite clearly and specifically stated that its claim for work in the grievance which gave rise to this complaint was restricted to work in connection with the installation of sheet metal siding onto wood. The Board's decision in this respect was completely accurate and we saw no reason to permit the Carpenters to resile from its earlier position. The Carpenters' request for reconsideration was therefore dismissed (in an oral ruling).

28. We note that Ron Carlton, Business Manager of the Carpenters for Lambton County, subsequently testified and specifically stated that the Carpenters Union will refer its members to perform such work if an employer chooses to perform it with carpenters, but that the Carpenters Union does not claim the application of sheet metal siding onto metal as part of its trade jurisdiction in Lambton County.

29. In the result, the work which was the subject of this complaint is all work in connection with the off-loading, handling, distribution, site transport, rigging erection, installation and application of all sheet metal siding at the Loeb IGA store on Exmouth Street in Sarnia, but the work actually remaining in dispute after the Carpenters' concession was all such work in connection with sheet metal siding installed onto wood at that job site. Consequently it is the latter upon which the litigation herein focused.

IV - Evidentiary Rulings

(a) Area Practice Evidence

30. At the November 26, 1991 hearing, the Board made certain (oral) directions with respect to the area practice materials filed by the parties and the evidence which they proposed to lead in that respect. The Board reiterated its directions in a written decision, dated November 28, 1991. In the course of that decision, the Board wrote that:

- 4. From what followed, it emerged that the positions of the parties are such that it will be necessary for the Board to hear evidence regarding the practice of assigning work in connection with the installation of siding on all sub-structures. However, it also became apparent that there

might be a more expeditious way to do it than through a parade of witnesses. The Board therefore directed the parties to provide the following information with respect to all job sites listed in their materials with respect to which they had called, or intended to call, evidence:

- a) the date(s) of the job;
- b) the location of the job;
- c) the names of all contractors involved with the contracts for and application of siding on the job together with an indication of which of the two unions involved in this case each such contractor had a collective bargaining relationship with at the time;
- d) the square footage of the siding installed;
- e) the man-hours the job took to complete;
- f) the sub-structure(s) onto which the siding was applied or installed;
- g) the trade to which the siding work was assigned and, if different, which trade did the work.

Further, the Carpenters were directed to particularize the factual basis for its "Sarnia Construction Association" argument as mapped out at the November 26, 1991 hearing.

31. Although it took them longer than expected, the parties did exchange and file documents which reflected the results of their efforts to comply with the Board's these "job list" directions.

32. The Sheet Metal Workers were not satisfied with the Carpenters' filings. When the hearing resumed on March 2, 1992, the Sheet Metal Workers submitted that the Carpenters' job list contained references to work which had not been referred to in the materials filed previously with the Board, and that the facts pleaded in it lacked the requisite particularity in any event. The Sheet Metal Workers objected to the Carpenters calling evidence with respect to jobs which were either "new" or not properly particularized. Vic West and the Ontario Sheet Metal and Air Handling Group (which though respondent and intervenor respectively were represented at the hearing by the same counsel and are allied in interest with the Sheet Metal Workers in this proceeding) supported the Sheet Metal Workers' position.

33. The Carpenters argued that it had performed the best investigation it could and that it had been unable to provide further particulars because the contractors it had contacted had been uncooperative. The Carpenters also submitted that it was too onerous to require a party to provide area practice particulars in the form of a job list within three-week window stipulated by the then Practice Note No. 15. The Carpenters submitted that there was nothing nothing in the Practice Note which precluded it from presenting evidence with respect to work which had not been previously referred to in its filings.

34. Upon hearing the representations of the parties with respect to this Sheet Metal Workers' objection, the Board ruled (orally) that it would not receive evidence of area practice to which there was no reference in the materials filed prior to November 26, 1991. Notwithstanding that the job list filed by the Carpenters in response to the Board's November 1991 directions fell far short of providing the particulars contemplated, the Board declined to rule, *at that time*, that the Carpenters had failed to make reasonable efforts to obtain the requisite particulars. Because we wanted to get on with the hearing and avoid delaying the matter to make rulings which might ultimately prove to be unnecessary, the Board ruled that the Carpenters could seek to call evidence with

respect to items on its job list which were not “new” (and therefore excluded by our ruling in that respect), subject to the right of the other parties to make specific objections which could be dealt with when made.

35. Unfortunately, this approach proved to be unworkable. On September 16, 1992, the Board was required to revisit the issue. The Sheet Metal Workers raised an objection in the course of the testimony of the Carpenters’ first witness, and it was apparent from the way in which the matter had unfolded in the interim, that it was necessary and appropriate to deal with this area practice evidentiary issue in a comprehensive way.

36. In essence, the Sheet Metal Workers, again supported by Vic West and the intervenor, renewed their March 2, 1992 objection; that is, that the job list provided by the Carpenters in response to the Board’s November 26, 1991 directions (which job list had been marked as Exhibit 22) was “new” in that it did not relate to materials originally filed or, in the alternative, that it was inadequately particularized. The Sheet Metal Workers, submitted that the Carpenters should not be permitted to call evidence with respect to anything on this job list, or with respect to anything in its original materials which had not been properly particularized either pursuant to the Board November 1991 directions or otherwise. The Carpenters argued that with the exception of the Sandrin Bros. jobs shown on its Exhibit 22 job list, neither the Board’s March 2, 1992 ruling nor anything else precluded it from calling evidence with respect to the contents of that job list, or with respect to its original area practice filings. Counsel submitted that he and his office had, on behalf of the Carpenters, made reasonable efforts to obtain the requisite particulars but had been unable to do so, that the job list contained sufficient particulars to permit the parties to identify and investigate the area practice the Carpenters asserted and sought to rely on, and that there was no prejudice to any party as a result of any deficiency in that respect.

37. Although the Board considered Practice Note 15, the March 2, 1992 decision was not merely a question of applying that Practice direction. Practice Note No. 15 was merely a starting point. It requires every party to a jurisdictional dispute complaint to the Board to file certain specified documents and all documents upon which they rely, and “... a Brief which contains a concise statement of the issues in dispute, including a detailed description of the work in dispute, and the material facts upon it intends to rely.” These pleading requirements, and the pre-hearing conference process, are designed to compel the parties to identify and properly address themselves to the matters and issues between them before any hearing, so that a rational attempt can be made to settle the matter, or failing settlement, to clarify and narrow the issues in order to facilitate an orderly and expeditious hearing of the complaint. If parties make a meaningful effort to comply with the Board’s rules, practice directions and case specific directions (if any), a jurisdictional dispute complaint will be resolved more fairly and expeditiously than it they do not.

38. This complaint was the subject of two pre-hearing conferences. The pre-hearing memorandum in that respect revealed that the pre-hearing process accomplished very little. However, the second memorandum, dated August 1, 1991 (almost a year and a half after the complaint was filed) indicates that *on consent of the parties*, the Board directed them to “... exchange with each other, and deliver to the Board, by the morning of August 26, 1991, a statement indicating which of the facts pleaded by the other parties they agree with, and which of the facts pleaded by the other parties they do not agree with, explaining why they might disagree with any of those assertions.”

39. The parties did exchange statements. Indeed, the Carpenters took the opportunity to file a “supplementary” pre-hearing Brief. In it, the Carpenters stated that its previous concession that the installation of sheet metal siding onto metal had been properly assigned to members of the

Sheet Metal Workers in this case was not a general concession in that respect. The Carpenters also made additional statements and submitted additional documents with respect to “area practice”. No one objected to the filing of this “supplementary” Brief.

40. In the result, the Carpenters had nearly a year and a half to gather and file particulars of the area practice it wished the Board to consider in this case.

41. Since the amendment of Practice Note No. 15 (in August 1988), the Board has consistently required parties to comply with it. It may be that in some cases a party has been permitted to call evidence with respect to matters which have not been adequately particularized. However, this merely demonstrates the Board’s willingness to exercise its discretion in that respect in appropriate circumstances. It does not mean that the Practice Note need not be taken seriously. On the contrary, the Board’s recent jurisprudence demonstrates that parties to a jurisdictional dispute complaint run a significant risk of being precluded from calling evidence of matters they have failed to properly particularize (see, *Spruce Falls Power and Paper Company Limited*, [1989] OLRB June 645; *E.S. Fox Ltd.*, [1992] OLRB Feb. 145; *Ellis-Don Limited*, [1992] OLRB June 695). *Acco Canadian Material Handling*, Board File No. 2841-88-JD, July 18, 1989 unreported, which was referred to by the Carpenters, is both consistent with the Board’s general approach and demonstrates the utility of the pleading requirements of the Practice Note.

42. In arriving at our March 2, 1992 ruling, we concluded that it would have been contrary to Practice Note No. 15, and the plain wording and intent of the Board’s November 1991 job list directions, to permit the Carpenters to slip in particulars of area practice evidence to which there had been no earlier reference. It would also have been unfair, in our view, to the other parties, particularly Vic West and the intervenor which had already closed their case in chief, to permit the Carpenters to do so after the hearing was well underway. Except in extraordinary circumstances, or where a satisfactory explanation is offered, a party will not generally be permitted to unilaterally alter the structure of a proceeding by adding new allegations or particulars.

43. In this case, we were not satisfied that there were extraordinary circumstances or a satisfactory explanation. In addition to Practice Note 15, the Board had specifically directed the parties to provide specified information “with respect to all job sites *listed in their materials* with respect to which they had called, or intended to call, evidence” (emphasis added). The Carpenters’ response, Exhibit 22, did not, as we observed on March 2, 1992, contained the necessary particulars. Further, in response to a question from the panel, counsel for the Carpenters specifically stated that there was *nothing* in Exhibit 22 which relates to anything in either of the two Briefs the Carpenters filed before the hearing on the merits began. We understood counsel to mean that everything in Exhibit 22 was new.

44. The Board’s November 1991 direction clearly required the parties to exchange and file particulars, in the nature of the job list, of the jobs to which they had already referred to in their materials, and only to such jobs. These directions were not intended to present an opportunity to introduce new area practice. Although the Sheet Metal Workers March 2, 1992 objection in that respect focused on the Sandrin Bros. jobs listed in Exhibit 22 as examples of both new and inadequately particularized area practice, neither that objection nor the Board’s ruling on it was limited to those examples. On the contrary, the Board had specifically ruled that it would not receive evidence of *anything* in Exhibit 22 which was new; that is, if it did not relate to area practice materials filed prior to November 26, 1991, the Board would not hear the evidence. Since the Carpenters conceded that everything in Exhibit 22 is new, the result of the Board’s March 2, 1992 ruling was that the Board would not receive evidence of anything in it. To the extent that it was necessary to clarify matters, the Board so ruled.

45. Further, since the Carpenters conceded that everything in Exhibit 22 was new, it followed that nothing in it constituted particulars of the Area Practice referred to in its two Briefs. That is, the Carpenters have filed *no* particulars in accordance with the Board's November 19, 1991 directions.

46. The Carpenters again asserted that it had made reasonable efforts to obtain particulars and that the Board should therefore receive the evidence the Carpenters had to offer in that respect. Counsel advised that he had written a letter to Doug Chalmers Construction (which appeared to constitute a significant part of the area practice the Carpenters wished to rely on) requesting particulars and that his firm had followed up that letter by telephone. Counsel said that he had personally gone to Sarnia for one day which he spent talking to various people, mainly members of the Carpenters Union. In the result, no particulars were obtained.

47. For purposes of dealing with the September 16, 1992 objection, the Board accepted counsel's account of the efforts made to obtain particulars. We found that writing a letter, making a few telephone calls, and making a single, and what must have been a rather brief visit to the area was not, in the circumstances, adequate in that respect. Indeed, it seemed to be little more than a token effort. A party to a jurisdictional dispute complaint (or any other proceeding) must take whatever steps are required to ensure that the particulars or materials which it is obliged to put before the Board, whether by the Board's Rules, Practice Note, Board direction or otherwise, are in fact put before the Board in some comprehensible form. Difficult though it may be, it is incumbent upon a party to do so. Further, we found it difficult to understand how a party could have a hard time providing particulars of something which it had alleged, particularly, where, as the Carpenters did here, it states that it has the necessary evidence at hand. If a party is really unable to provide the requisite particulars, one might well wonder what basis there was for making the allegation in the first place.

48. Further, the purpose of particulars is to inform the other parties of the case they must prepare to respond to, and to give the proceeding focus and make it manageable. If a party, in this case the Carpenters, is unable to obtain the particulars of area practice on which it wishes to rely, how can the other parties be expected to deal with it? The other parties appeared to have no difficulty in providing particulars of what they asserted was the relevant area practice.

49. In the result, we were satisfied that the Carpenters did not comply with the Board's November 1991 direction. The Board was also satisfied that, with the exception of an EPSCA job referred to in tab 4 of the Carpenters first Brief, the area practice materials in both of the Carpenters' Briefs lacked the particularity required, either by Practice Note No. 15 or the Board's directions. It was, or should have been, well understood that if a party did not provide particulars as directed, and any other party objected in that respect, the delinquent party would not be permitted to adduce area practice evidence to the extent that particulars were lacking. The Board therefore ruled, on September 16, 1992, that the Carpenters would not be permitted to call area practice evidence to the extent that its materials had not been properly particularized as aforesaid.

50. The matter did not end there, however. On October 14, 1992, the Carpenters again sought to lead evidence of matters referred to in Exhibit 22. When it was brought counsel's attention that the Board had already ruled that it would not receive such evidence, counsel asserted that he had not understood that to have been the ruling. Counsel said he had understood the ruling to relate only to evidence of the practice of Doug Chalmers Construction.

51. Counsel apologized for his misunderstanding and sought reconsideration of the September 16, 1992 ruling. Counsel repeated his plea that reasonable efforts had been made to provide the particulars directed by the Board and that it was not his or the Carpenters fault that these

efforts were not productive. Counsel also cross-referenced Exhibit 22 and the area practice materials in the Carpenters' first Brief.

52. The Board was not persuaded that there was any cogent reason to reconsider its September 16, 1992 ruling. The September 16, 1992 ruling was clear. Any misunderstanding in that respect, though unfortunate, did not detract from the fact that the ruling had been made. Nor did Carpenters' counsel say anything new in support of his assertion that reasonable efforts had been made to provide the required particulars. The Board found those efforts inadequate on September 16, 1992, and they were still inadequate on October 14, 1992.

53. When the same issue was being argued on September 16, 1992, counsel said very clearly that nothing in Exhibit 22 related to anything in tab 4 of the Carpenters' Brief. This statement was made in response to a specific question which the panel asked because it was not at all apparent that Exhibit 22 had any connection to the previously filed materials. On October 14, 1992, counsel took a different position and asserted that items 1, 2, 3, 4, 7, 9, 11 and 13 in Exhibit 22 were particulars of jobs listed on the third page of tab 4 of the Carpenter's first Brief. Counsel submitted that these particulars either fully or substantially satisfied the Board's November 1991 directions.

54. On the face of the two documents there is no connection between them. With the assistance of counsel's cross-referencing at the hearing, it was possible to discern an apparent connection between the items in Exhibit 22 identified by him and items on page 3 of tab 4 of the Carpenters' first Brief. However, the discrepancies in the information between the two documents made it impossible to make that connection without counsel's assistance with respect to all but item 7 in Exhibit 22, and even then October 14, 1992 was too late to make that connection. In the result, the Carpenters' request for reconsideration of the Board's September 16, 1992 ruling was dismissed.

55. Counsel asked for immediate written reasons for the Board's ruling. Though under no obligation to provide written reasons for other than a final decision, the Board indicated that it would provide written reasons at an appropriate time (namely herein) but that we would not interrupt the proceedings to do so. Counsel then asked for time to consider his position and obtain instructions. In the circumstances, including the proximity to the normal lunch break, the Board adjourned for lunch.

56. Upon reconvening after lunch, Carpenters' counsel stated that he was instructed to make a written request for reconsideration and to request an adjournment for that purpose. The Board saw no reason to adjourn the proceeding to permit yet another request for reconsideration of its evidentiary ruling and the request was denied.

57. Sure enough, the Carpenters again sought reconsideration of the Board's evidentiary ruling by letter dated November 3, 1992. There was little new in the Carpenters' written submissions other than an assertion that it was beyond the Board's jurisdiction and a denial of natural justice for the Board to refuse to receive what the Carpenters asserted was relevant area practice evidence.

58. The Board saw no reason to reconsider its earlier decision in that respect. For evidence to be relevant it must relate to a pleaded material fact. The evidence which the Carpenters sought to lead was not relevant to the material to the facts it had pleaded or particulars it had provided. Further, *all* parties are entitled to natural justice. In our view, to permit the Carpenters to lead evidence with respect to facts which it had failed to plead or particularize as it was required to, would, in the circumstances, have been a denial of natural justice to the Sheet Metal Workers and Vic West (and the intervenor). This request for reconsideration was therefore dismissed as well (orally at the November 10, 1992 hearing).

(b) - Recalling of a Witness

59. Near the conclusion of their case, the Sheet Metal Workers sought to call Roland Hill as a witness. The Carpenters objected on the basis that Hill had already testified, as Vic West's (and the intervenor's) witness. The Sheet Metal Workers asserted that they should be permitted to recall Hill in order to put "fuller and more complete" evidence of the practice of a company named Peerless enterprises before the Board in accordance with the Board's interest in that respect as expressed in the November 1991 job list directions as aforesaid. Vic West and the intervenor supported the Sheet Metal Workers' position, pointing out that the Carpenters' objection could not be sustained if the Sheet Metal Workers sought to call someone other than Hill to testify with respect to the practice of Peerless.

60. The Board allowed the Carpenters' objection and ruled that Hill could not testify again. The Sheet Metal Workers were seeking to recall Hill; they were not seeking to call someone else for the first time. Hill had already testified as a witness of Vic West and the Ontario Sheet Metal and Air Handling Group. He had been examined by their counsel and cross-examined by counsel for the Sheet Metal Workers. The complainants, responding party and intervenor respectively, the Sheet Metal Workers, Vic West and the Ontario Sheet Metal and Air Handling Group are allied in the interest of this proceeding. Hill was an employee of Peerless when he first testified and the Board was satisfied that he could have testified about the relevant practice of Peerless at that time. It appeared that what the Sheet Metal Workers were trying to do was to fill what they perceived were gaps in the evidence which did not become apparent until after Hill had left the witness stand.

61. Nothing in either the November 28, 1991 or March 2, 1992 rulings by the Board did anything to change the nature or focus of this complaint. Nor, until September 15, 1992 (when the Sheet Metal Workers sought to recall Hill), was there any suggestion that the Board's directions or rulings had placed any party in a position that required or might require a party to seek to recall a witness. Indeed, the November 1991 directions required no more than the filing of appropriate particulars of the cases which the parties had already pleaded, and which it was hoped would expedite the proceeding. The March 2, 1992 ruling confirmed this. The fact that the Sheet Metal Workers, and Vic West and the intervenor, intended to rely upon evidence with respect to the practice of Peerless was well known to all from the outset as evidenced by the Briefs filed by them in that respect.

62. Other than in reply, a party should not be permitted to recall a witness, whether its own or that of another party, except in extraordinary circumstances. All parties must ask whatever questions they may have of a witness with respect to the matters and issue in a proceeding when that witness testifies. If any party does not do so, either purposely or through inadvertence, it cannot be expected to be able to recall a witness to answer questions which could have been asked the first time without requesting leave to do so, which leave the Board will not grant unless there is a cogent reason to do so. In our view, there was no such cogent reason in this case.

IV - Motion to Terminate the Proceedings

63. At the hearing on October 5, 1992, the Carpenters advised the Board that it and Vic West had resolved the grievance in Board File No. 2715-89-G, and that, pursuant to the agreement between them in that respect, the Carpenters sought leave to withdraw that grievance and referral to the Board. The Carpenters indicated that if leave was granted, as in its submission it had to be, it would request that the Board terminate the jurisdictional dispute proceedings herein on the basis that the demand for the work which had given rise to the complaint, namely the grievance, no longer existed.

64. The grievance in Board File No. 2715-89-G was not before the Board on October 5, 1992. However, no one objected to it being brought forward, and upon doing so, and upon hearing the representations of the parties, the Board granted the Carpenters' request and the grievance in Board File No. 2715-89-G was withdrawn with leave of the Board. However, the Board also directed that a copy of the written agreement between the Carpenters and Vic West in that respect be filed with the Board as an Exhibit in this proceeding.

65. The Board then heard the representations of the parties regarding the effect of the disposition of the grievance on this complaint. The Carpenters argued that the removal of the grievance meant that the demand for the work in dispute herein which led to the complaint no longer existed, and that therefore the Board no longer had the jurisdiction to deal with it. Counsel referred to the Board's decision in *E.S. Fox*, [1990] OLRB May 504 in that respect. In the alternative, the Carpenters submitted that there was no good labour relations or other reason to continue with the jurisdictional dispute complaint in the circumstances.

66. The responding party Vic West supported the Carpenters (as it was obliged to do by the agreement between them). Counsel for Vic West observed that it was likely that the Board's jurisdictional dispute process would change in the near future (a reference to the anticipated amendments to the *Labour Relations Act* which have since come into force and the new streamlined jurisdictional dispute procedure) such that the time and energy invested in this proceeding would not have to be reinvested if the same issue was brought before the Board again in another case. Counsel submitted that there was nothing to be gained from proceeding with this complaint.

67. The Sheet Metal Workers did not agree. They reviewed the history of this complaint. They argued that all the parties had agreed to the Board's jurisdiction to hear and determine the jurisdictional dispute herein, and that it was not open to any party to now challenge the Board's jurisdiction in that respect so late in the process. The Sheet Metal Workers submitted that, given the stage of the proceeding, the settlement of the grievance should be taken as an acknowledgment of the Sheet Metal Workers' jurisdictional claim in the complaint and that the Board should therefore make the appropriate orders in that respect, including orders regarding future jobs in Board Area 2 generally. Counsel argued that once a hearing on the merits has begun, a "withdrawal" by a complainant or the responding parties entitles the parties opposite to a disposition of the matter on its merits. Counsel referred to the Board's decision in *Steen Contractors Limited*, [1986] OLRB Rep. May 677. He also argued an analogy based on Rule 23 of the Ontario Rules of Civil Procedure and referred to Court decisions in *Blum v. Blum*, [1965] 1 O. R. 236 (Court of Appeal), *Hennig v. Northern Heights (Sault) Ltd.*, [1981] 30 O.R. 2nd 346 (Court of Appeal), and *McCarthy v. Acadia University*, [1977] 3 C.P.C. 42 (Nova Scotia Court of Appeal). The Sheet Metal Workers submitted that while it is appropriate for the Board to encourage settlement, the Board should do so responsibly, and that in this case the Board should award the relief sought by the Sheet Metal Workers for both labour relations reasons and to prevent what they counsel characterized as an abusive process in the form of a tactical withdrawal in the middle of the withdrawing parties case. In the alternative, the Sheet Metal Workers argued that the Board should either continue with the hearing or at least order the Carpenters to pay the Sheet Metal Workers' costs of this proceeding.

68. As we have already indicated, this jurisdictional dispute complaint was filed on April 2, 1990, in response to the Carpenters' grievance in Board File No. 2715-89-G. In the grievance proceeding, the parties (which included the Sheet Metal Workers as an intervenor for those purposes) agreed among themselves that the Board should defer consideration of the grievance pending the disposition of this complaint. However, because the responding party Vic West had denied that the Carpenters held any relevant bargaining rights, the Board decided, for the reasons expressed in

Schindler Elevator Corporation, [1990] OLRB Rep. Oct. 1092 (request for reconsideration dismissed [1991] OLRB Rep. Jan. 111) the Board decided to deal with the bargaining rights issue in the grievance proceeding first (see Board decision dated December 10, 1990 herein in that respect).

69. Before that issue could be heard by the Board, the responding party Vic West conceded, by letter dated March 25, 1991, that the Carpenters did indeed hold relevant bargaining rights. Having regard to that concession, and to the agreement of the parties with respect to how the matter should then proceed, the grievance proceeding was adjourned *sine die* pending the disposition of this complaint.

70. The Board then proceeded with the hearing on the merits of this complaint. When the Carpenters made its motion to terminate this proceeding on October 5, 1992, there had been ten days of hearing (including the May 22, 1991 hearing day when preliminary matters were dealt with). Fifteen other hearing days had been scheduled but were adjourned. Three more hearing days remained.

71. It seemed probable that the Board's rulings as aforesaid played no small part in assisting the Carpenters to come to a settlement of the grievance with Vic West. Indeed, in his submissions in support of the "termination motion", counsel for the Carpenters specifically said that the Board's "technical" rulings had had something to do with it. The Carpenters and Vic West reduced the settlement of the grievance in writing as follows:

OLRB FILE NO 2715-89-G

Between

United Brotherhood of Carpenters & Joiners of America, Local 1256

Applicant

and

Vic West Steel Limited

Respondent

Whereas the parties wish to resolve the grievance which is the subject of OLRB File No. 2715-89-G

The parties hereby agree as follows:

1. The Respondent acknowledges and agrees that it is bound to the Carpenters Provincial I.C.I. Collective Agreement between the Carpenters' Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America.
2. The Respondent acknowledges that at the time that the work which is the subject of this grievance was assigned and at the time the subject grievance was filed, the Respondent was not aware that it was bound to the afore-mentioned Collective Agreement.
3. The Respondent agrees that when assigning the installation of siding in future in Lambton County, the Respondent will consider the jurisdictional claims of both the Applicant and the Sheet Metal Workers Local 539 to such work.

4. The Applicant hereby withdraws the grievance and section 124 referred in OLRB File No. 2715-89-G.
5. The Respondent agrees to support the request of the Applicant to terminate the proceedings on O.L.R.B. File No. 0013-90-JD in light of paragraph 4 herein.

Dated at Toronto this 5th day of October, 1992

72. It was in this context that the Carpenters brought their motion to terminate this complaint.

73. In *E.S. Fox, supra*, the Board allowed a similar motion as follows:

10. We find it unnecessary to determine whether the Board has jurisdiction to inquire into a complaint concerning work assignment in circumstances like those in this case. Assuming, without finding, that the Board does have the jurisdiction to continue to inquire into the merits of this complaint, this is, in our view, an appropriate case for the Board to exercise its discretion to not do so. (*We do note, however, that we find much merit in the submission that the Board is without jurisdiction to do so.* In that regard, we prefer the suggestion that the words “was or is requiring” in section 91(1) refer to whether or not the work in dispute has been completed to the submissions of the complainant in that respect. In our view, it would make little sense, from either a labour relations perspective or otherwise, to interpret section 91(1) in a way which would effectively prohibit a party which has made a demand that certain work be assigned in a different way from withdrawing that demand in every case: See *Anchor Shoring Limited, supra*; *Commonwealth Construction Company, supra*; but see *Scope Mechanical Contracting Limited, supra* for a contrary view.)

11. *Scope Mechanical Contracting Limited, supra*, was a complaint concerning the assignment of work (i.e. a jurisdictional dispute). One of the respondents had filed two grievances: one against the employer which had assigned the work in question to members of another trade union, and one against the general contractor alleging that it had improperly subcontracted the work in question to the employer which had assigned the work. Both grievances were referred to the Board pursuant to section 124 of the Act. Subsequently, the grievance against the employer which had assigned the work in question was withdrawn with leave of the Board. Consideration of the second grievance was deferred pending the disposition of the jurisdictional dispute. The respondents argued that the Board had no jurisdiction to inquire into the jurisdictional dispute because the grievance against the employer which had assigned the work in question had been withdrawn and there was therefore no one requiring that the work assignment be changed. The Board referred to *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247 and was satisfied that the grievance against the general contractor could not give rise to a complaint under section 91 (see also *Harold R. Stark Co. Ltd.*, [1982] OLRB Rep. Feb. 222, April 5, 1976). The Board held that notwithstanding that the grievance against the employer which had assigned the work had been withdrawn, the necessary demand that the work assignment be changed had been made and that the Board had jurisdiction to inquire into. However, there is no indication on the face of the Board’s decision in *Scope Mechanical Contracting Limited, supra*, that the Board was asked to or that it considered whether it should inquire into the complaint even if it had the jurisdiction to do so. Because we have determined that it is appropriate for us to exercise our discretion to not inquire into this complaint even if we have the jurisdiction to do so, the *Scope Mechanical Contracting Limited, supra*, decision was of little assistance to us and we decline to comment on it further.

12. In *Steen Contractors Limited, supra*, the Board drew an analogy between a jurisdictional dispute proceeding and a civil proceeding in which a claim and counter-claim is made and to a mechanic’s lien action in which a number of claims are made. With great respect, neither analogy is, in our view, an apt one. First, in a civil proceeding, a claim and counter-claim are considered to be separate actions within the same proceeding. In a complaint under section 91, there may be competing claims for the work in question, but there is only one action. Second, labour relations considerations are very important in jurisdictional disputes but have little or no place in civil proceedings or mechanic’s lien actions. It was precisely such labour relations consider-

ations which led the Board to deny the complainant's request for leave to withdraw its complaint in *Steen Contractors Limited*, *supra*. In paragraph 16 of that decision, the Board explained its reasons in that respect as follows:

16. In the instant case, therefore, while it may not make sense to compel Plumbers' Local 463 to pursue its initial claim in spite of its request to withdraw it, there are good labour relations reasons for not allowing Local 463 to bring to an end the proceedings with respect to Labourers' Local 597's counter-claim to the work. First, the work in dispute herein has been and remains a source of conflict between the two trade unions in the Oshawa area, conflict which has demonstrated a potential for causing unlawful strikes. Therefore, it makes labour relations sense that the Board proceed to determine the merits of the dispute, as Labourers' Local 597 and the intervener have argued. Second, in view of the Board's comments at paragraph 16 of its decision in the *Stark* case, *supra*, about the problems of dealing under section 124 of the Act with what is essentially a work assignment dispute, it also makes labour relations sense that the determination be made in the context of a section 91 complaint rather than leaving it to arise again as a referral of a grievance under section 124. *Given the purpose of section 91 and the fact that Plumbers' Local 463 initially came before the Board with a request for an inquiry into its claim concerning a work assignment dispute and with a request for an interim order, which it obtained, the Board is of the view that this is a case where the complainant should not be permitted to unilaterally cause the proceedings to be terminated. To allow Local 463 to do so would mean that the conflict which gave rise to the complaint would remain unresolved. The Board is not prepared to have that happen. Moreover, Local 463 has enjoyed the benefit and protection of the Board's interim order and, having set in motion a request for a final order or direction respecting the work in dispute, it should not be permitted to deprive Labourers' Local 597 and the intervener of the opportunity to have their interests in a potentially disruptive dispute protected by means of an adjudication of the matter on its merits.*

(emphasis added)

13. In this case, there is no indication that the work in question is a source of conflict with the demonstrated or any potential for causing unlawful strikes. Second, this is not a case in which Local 562 or the Sheet Metal Conference seek to have the proceedings terminated after having obtained the benefit of some interim relief with respect to the work assignment in question. In short, the labour relations considerations which led the Board in *Steen Contractors Limited*, *supra*, to exercise its discretion to inquire into the complaint in that case are not present in this one. Accordingly, it too was of little assistance to us.

14. The Board is an adjudicative tribunal, not an advisory body (except where the statute specifically enables the Minister to refer to the Board any question that arises with respect to the Minister's authority to make an appointment under sections 16, 44 or 45 of the Act). Accordingly, the Board does not normally embark upon inquiries into academic or hypothetical questions (see, for example, *Magna International Inc.*, *supra*; *Beverly Enterprises Canada Limited*, *supra*; *Daynes Health Care Limited*, [1983] OLRB Rep. May 632). The Board's function is to determine labour relations matters brought before it under the *Labour Relations Act* or other legislation (like, for example, the *Occupational Health and Safety Act*, R.S.O. 1980 Chapter 321 and the *Colleges Collective Bargaining Act*, R.S.O. 1980 Chapter 74). In our view, it would be generally futile and perhaps counterproductive for the Board to engage in speculation with respect to disputes which have not developed either to the point that they have been brought before the Board or at all.

15. Perhaps the Board will have to deal with a jurisdictional dispute like this one in the future. Perhaps not. If it does, who can say what differences there will be between this dispute and one which may come before the Board in the future? Any future case may well involve work which is somewhat different, it may involve different parties, it may involve a different geographic area, and it may even involve a different sector of the construction industry.

16. In jurisdictional disputes, which are difficult enough to determine even with the benefit of evidence and representations from the parties which are affected by the dispute, it is rarely pos-

sible and generally inappropriate for the Board to attempt to determine anything more than the complaint before it. Similarly, attempts at advance rulings are generally inappropriate. The impact that the Board's jurisdictional dispute jurisprudence has on a future case is best left to be determined in that future case.

17. It is fundamental to a complaint concerning the assignment of work that there be a dispute concerning the assignment of some specific work. Where there is no demand that some specific work be assigned in the manner different from the way it was assigned, there is no continuing dispute concerning the assignment of work and no jurisdictional dispute which is appropriate for the Board to inquire into in the absence of extraordinary circumstances (as in, for example, *Steen Contractors Limited, supra*).

18. In this complaint, the demand that the assignment that the work described in paragraph 4 above be changed came in the form of the grievance which has since been withdrawn. Accordingly, there is no longer any trade union which is requiring that that work assignment be changed.

19. To proceed with an inquiry into a complaint where its basis has disappeared would tend to emasculate the pre-hearing procedure which has been adopted by the Board in complaints concerning work assignments. The purpose of that pre-hearing procedure is to encourage the resolution of jurisdictional disputes without a determination by the Board. Such resolutions can and sometimes do include the withdrawal of the complaint or the demand which led to it being made after the discovery afforded by the Board's pre-hearing process, and, in some cases, a determination of issues which, though they are preliminary in nature, tend to shape the litigation. Also, and perhaps more importantly, to proceed with a jurisdictional dispute in such circumstances will not usually further harmonious labour relations. Indeed, it would likely have quite the opposite effect.

20. We recognize the expense (in terms of both time and money) that the parties have incurred in this matter. The fact that Local 562 has decided to retract its demand that the work assignment in question be changed shows that this has not been for nought. In any event, the fact that expenses have been incurred is not a reason to require a matter to continue to be litigated to the bitter end and certainly does not, in our view, constitute "prejudice" within the meaning of that term in law. We also observe that if, as the complainant fears, a complaint is made to the Board with respect to the same or substantially the same work, some or all of the parties will be able to draw upon the time and money invested in this proceeding in the course of that one. If there is no such future complaint, there is no point at all to forcing this proceeding forward.

21. In short, we are not satisfied that there is any cogent reason to proceed further with this complaint. On the other hand, the labour relations considerations favour not proceeding with it. In the result, we find it appropriate to exercise our discretion to not inquire further into this complaint. The complaint is therefore dismissed.

(emphasis in paragraph 10 added)

74. The *E.S. Fox, supra*, decision was expressly made in the exercise of the Board's discretion under section 93 of the Act, based on the assumption that the Board had the jurisdiction to continue with the matter if the Board considered it appropriate to do so. Further, a hearing on the merits of the complaint in *E.S. Fox, supra*, had not yet begun. We do not agree with the Board's obiter suggestion in paragraph 10 of the *E.S. Fox, supra* decision that the withdrawal of the grievance which raises a jurisdictional dispute complaint removes the Board's jurisdiction to entertain that complaint. Otherwise, we agree with the *E.S. Fox, supra* decision.

75. In the interests of labour relations stability in the construction industry (which is the context in which the vast majority of jurisdictional disputes complaints arise), the Board has adopted a broad approach to jurisdictional disputes. Once satisfied that it has the jurisdiction to do so, the Board will generally hear a complaint concerning work assignment on its merits unless there are good labour relations reasons not to do so. It is not uncommon for a grievance to raise an

issue which is essentially or substantially a jurisdictional dispute. When a complaint under section 93 has been filed with respect to the same assignment of work which is the subject of a grievance which has been referred to the Board, the Board is faced with deciding how the dispute is best resolved. The purpose of section 126 (the provision pursuant to which a grievance in the construction industry is referred to the Board for arbitration) is to provide an expeditious mechanism for resolving grievances in an industry in which the nature of the work and the structure of labour relations often renders ineffectual the kinds of arbitration provisions typically found in collective agreements. On the other hand, section 93 is specifically designed to be the primary means by which jurisdictional disputes are to be resolved. Accordingly, although there may be circumstances in which it is not appropriate to do so, the Board will generally defer consideration of a grievance until a jurisdictional dispute which relates to the same assignment of work has been resolved. When faced with that kind of situation, the Board has generally concluded that the grievance constitutes a demand for the work in question (*Eaman Riggs Limited*, [1978] OLRB Rep. March 228, *Napev Construction Limited*, [1979] OLRB Rep. Sept. 886, *Pre-Con Company (a division of St. Mary's Cement Limited)*, [1981] OLRB Rep. July 947, *Ontario Hydro*, [1982] OLRB March 428). A jurisdictional dispute complaint need not be dispositive of a grievance before the Board will defer a consideration of the latter.

76. In *Schindler Elevator Corporation*, [1990] OLRB Oct. 1092, the Board declined to defer consideration of a grievance which had jurisdictional implications until a jurisdictional dispute complaint in that respect was disposed of on the basis that it was far from clear that the grievance would succeed, and it was not evident that any useful purpose would be served by setting the (then cumbersome) jurisdictional dispute process into motion until it was established that there had been a breach of the collective agreement therein as alleged by the grievance.

77. In this case, the parties agreed among themselves that the Board should defer consideration of the now withdrawn grievance in Board File No. 2715-89-G pending the disposition of this jurisdictional dispute complaint. For the reasons given in *Schindler Elevator Corporation*, *supra*, the Board decided not to proceed with the jurisdictional dispute notwithstanding the agreement of the parties. Instead, the Board directed that the grievance proceed at least to the stage of determining whether the Carpenters held any relevant bargaining rights with respect to Vic West. In a decision dismissing the Sheet Metal Workers' request that the Board reconsider its decision to proceed in this way (1991 OLRB Rep. Jan. 111), the Board reasoned that:

3. A recurrent complaint from the labour relations community in recent years has been that jurisdictional disputes take too long and are too expensive to litigate before the Board. The community has complained that this situation has developed because the Board has failed to be sufficiently active in directing the proceedings. The Board has been aware of and sensitive to these concerns. It too has experienced some frustration in that respect. Jurisdictional disputes have come to consume an ever increasing and disproportionate amount of the Board's resources. It has become increasingly apparent that the costs of jurisdictional dispute proceedings, both to the Board and to the parties, often far exceed the value of any benefit derived from them. That situation is rapidly going from bad to worse.

4. Originally, the parties agreed among themselves that it would be appropriate to defer the section 124 proceeding herein pending a determination of the complaint concerning work assignment filed by Sheet Metal. The Board will generally proceed in accordance with an agreement between parties in hearings before it. However, it has become apparent that the nature and diversity of interests involved in disputes concerning work assignments are such that it is unrealistic to expect that either the labour relations community in general, or the parties to a particular dispute are likely to do anything to reverse or stop the escalation in the temporal or financial costs of litigating such complaints. It is therefore appropriate for the Board to look more closely at such proceedings, and, having regard to the discretion which the Board has under section 91 of the *Labour Relations Act*, to be more willing to question and determine how such litigation should proceed.

5. We do not understand Sheet Metal's assertion that "... it is *not* the grievance filed by Carpenters', Local 1256 captioned as OLRB File No. 2715-89-G that "raises a spectre of a jurisdictional dispute"." It is readily apparent that the complaint in Board File No. 0013-90-JD has been filed in response to the grievance referred to the Board in Board File No. 2715-89-G. In that respect, we note that the work in question has been assigned to members of Sheet Metal, the complainant in the jurisdictional dispute proceeding. In addition, whether or not the United Brotherhood of Carpenters and Joiners of America, Local 1256 ("Local 1256"), the applicant in the section 124 proceeding, holds any relevant bargaining rights with respect to Vic-West Steel (Limited) (a respondent in both proceedings) remains an issue in both proceedings, notwithstanding the alteration of Sheet Metal's position in that respect. In addition to maintaining that Local 1256 holds no relevant bargaining rights, it is now Vic West Steel (Limited)'s position that the Board should proceed to determine that issue first, in the context of the section 124 proceeding.

6. It is implicit in the manner in which the parties have conducted themselves that it is common ground that Local 1256's grievance constitutes a demand for the work in question. But if Local 1256 does not hold the bargaining rights upon which its grievance is based, its grievance will be dismissed. Since there does not appear to be any competing demand for the work in question independent of Local 1256's grievance in Board File No. 2715-89-G, there would no longer be a jurisdictional dispute within the meaning of section 91 of the Act.

7. Of course, if its grievance fails, Local 1256 could itself file a complaint under section 91 which, if it proceeded, would raise the same work assignment dispute as the present complaint. However, a very significant difference would be that the issue of Local 1256's bargaining rights would have been determined as between the parties. It is true that the existence of bargaining rights is but one factor which the Board considers in determining jurisdictional disputes. However, a review of the Board's jurisprudence makes it readily apparent that it is a very significant factor where one of the trade unions involved holds relevant bargaining rights and the other does not. Consequently, a determination of the bargaining rights question is very likely to put the jurisdictional dispute into different perspective, whichever way it is determined, but particularly if Local 1256 is found to not hold any relevant bargaining rights. Consequently, resolving this issue before proceeding with a jurisdictional dispute may well reduce the costs of any jurisdictional dispute proceeding both to the Board (and therefore the taxpayer) and the parties.

8. In the result, we are not persuaded that it is either necessary or useful to proceed with the complaint concerning work assignment herein at this time. Nor are we satisfied that any prejudice will result to Sheet Metal if the Board proceeds to determine the bargaining rights issue in the section 124 proceeding first, given that the work assignment which is in dispute was made in favour of Sheet Metal and given that Sheet Metal now appears to take no position on the bargaining rights issue.

78. As we have already explained, Vic West subsequently conceded the bargaining rights issue and the Board proceeded with this jurisdictional dispute complaint.

79. It is true that there must be a demand for work which has been otherwise assigned before the Board had jurisdiction under section 93. Indeed, there could be no complaint unless there was a dispute regarding some assignment of work.

80. This complaint was filed by the trade union whose members were assigned the work in dispute, in response to the Carpenters' grievance which asserted jurisdiction over that work and that the work should be assigned to its members. The grievance was the only demand for the work in dispute.

81. At the time the motion to terminate was made, that was no longer the case. In this complaint, the Carpenters, though conceding that work in connection with the installation of sheet metal siding onto bases other than wood at the Loeb IGA Store on Exmouth Street in Sarnia had properly been assigned by Vic West to members of the Sheet Metal Workers, joined issue with the Sheet Metal Workers (and Vic West) with respect to the claim by the Sheet Metal Workers that the dispute in connection with the installation of sheet metal siding onto wood at that job site had

also been properly assigned to members of the Sheet Metal Workers. In response to a question from the panel during the argument of the "termination motion", the Carpenters specifically stated that it did not withdraw, amend or resile from any of the assertions or claims it had made in this proceeding. Those assertions boil down to this:

The work associated with the installation of sheet metal siding onto wood both generally and specifically at the Loeb IGA Store on Exmouth Street in Sarnia is within the trade jurisdiction of the carpenter and should have been assigned to members of the Carpenters Union.

82. Further, it was readily apparent that there was still a jurisdictional dispute between the Sheet Metal Workers and the Carpenters, both specifically with respect to the work in dispute herein and more generally with respect to the handling and installation of sheet metal siding in Lambton County.

83. We have already noted that in *E.S. Fox, supra*, the hearing on the merits had not yet begun. Further, it was not apparent that there was any continuing jurisdictional dispute which had to be resolved, and the Board was satisfied that there was no labour relations or other reason to continue with that complaint. In this case, it was apparent that the work in dispute continued to be a source of conflict between the Sheet Metal Workers and the Carpenters. Further, the Sheet Metal Workers wanted the dispute resolved. The Board was not satisfied that the responding parties should be allowed to unilaterally put an end to proceedings instituted by the complainant, even if one of them is allied in interest with the complainant in the particular proceeding. Finally, it was readily apparent that the Carpenters Union, after ten days of hearing, and after the parties opposed in interest had closed their cases, and because of the rulings against them as aforesaid, was simply attempting to avoid what it perceived should be a negative result for it in this matter.

84. Jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where, as in this case, it is clear that the jurisdictional dispute still exists. The circumstances of this case were significantly different from those in *E.S. Fox, supra*. The Board had jurisdiction to continue with this complaint and, in all the circumstances, the Board was satisfied that it made labour relations sense to do so to a determination of the dispute on its merits.

85. The Board therefore dismissed the Carpenters' motion and directed that the matter proceed (see Board decision dated October 8, 1992) in that respect.

COURT PROCEEDINGS

1761-88-OH; 1563-89-U (Court File No. 1759/91) Jill Bettes, Applicant v. Boeing Canada/de Havilland Division and Susan A. Tacon, John A. Ronson and David A. Patterson and Ontario Labour Relations Board, Respondents

Health and Safety - Judicial Review - Employee citing second-hand tobacco smoke in work refusal - Board finding health and safety not real reason for refusal and that employer discipline not unlawful in circumstances - Complaint dismissed - Employee seeking judicial review on ground that members' conduct give rise to reasonable apprehension of bias - Employee issuing summons to witness to Board member to secure evidence for use in judicial review application - Motions

court judge concluding that summons an abuse of process and quashing it - Three-judge panel of Divisional Court upholding decision of motions judge and dismissing motion to set decision aside

Board decision reported at [1990] OLRB Rep. Dec. 1213. Motions court decision reported at [1992] OLRB Rep. Oct. 1136; 10 O.R. (3d) 768.

Ontario Court of Justice (Divisional Court), Southey, O'Brien and Taliano JJ., March 22, 1993.

Southey J. (endorsement): Howden, J. carefully reviewed and correctly applied the applicable case law. He found a lack of evidentiary basis to support the issuance of the subpoena to examine a Board member. We agree with his conclusion that the subpoena was an abuse of process. There must be some admissible evidence to support the existence of the belief relied upon. The motion to review is dismissed with costs to the respondent Boeing here and below. We fix those costs at \$2,000, payable forthwith.

0762-91-G (Court File No. 435/92) The Electrical Power Systems Construction Association, Applicant v. Ontario Allied Construction Trades Council, International Association of Heat and Frost Insulators and Asbestos Workers Local 95, James Cord, and the Ontario Labour Relations Board, Respondents

Construction Industry - Construction Industry Grievance - Damages - Judicial Review - Remedies - Employer grieving against union and employee alleging improper claim and receipt of room and board allowance by employee - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing - Employer seeking judicial review - Divisional Court ruling that Board declined its jurisdiction to consider award of damages against the employee and remitting matter to the Board for its determination

Board decision reported at [1992] OLRB Rep. April 445.

Ontario Court of Justice (Divisional Court), McMurtry A.C.J.O.C., Van Camp and Steele JJ., March 30, 1993.

McMurtry A.C.J.O.C.: This is an application for judicial review of a decision of the Ontario Labour Relations Board, hereinafter referred to as the "Board", dated April 23, 1992, in which it declared that the Respondent James Cord, improperly claimed and received a room and board allowance from Ontario Hydro totalling \$11,650.00 to which he was not entitled under the applicable collective agreement, but held that it had no power to award damages in that amount against Cord.

Mootness

The respondents argued that James Cord had been convicted of fraud in relation to the room and board claim and that a compensation order had been awarded against Cord in favour of Ontario Hydro. This order is enforceable as a civil judgment and it is therefore argued that there was no longer any tangible dispute between the parties.

It may be that the substratum of the case between Ontario Hydro and Cord has disappeared. However, given the nature of the matter there is a real likelihood that a similar issue could arise again between the parties to the collective agreement. We are therefore of the view that a decision of this Court could well have some practical relevance in the future and have therefore decided to deal with the application on the merits.

Collective Agreement

The respondent James Cord was entitled under the Collective Agreement to “an increase in travel or room and board allowance” which he in fact claimed and obtained.

Article 30 of the Collective Agreement provides for arbitration. It states that after hearing and determining the dispute the arbitration board shall “issue a decision which is final and binding upon the parties and upon their respective members”.

Decision of Board

At the hearing before the Board, the Respondents argued that the grievance, insofar as it raised a claim against Cord personally, that it was not arbitrable. The Board held that it was arbitrable and made a declaration in the following terms:

On the basis of the above-quoted statement of facts and the exhibits referred to therein (which as noted above, are undisputed for purposes of these proceedings) it is abundantly clear the James Cord improperly claimed and received Room and Board Allowance totalling \$11,650 to which he was not entitled under Article 19 of the Master Portion of the Collective Agreement by misrepresenting to Ontario Hydro that his “regular residence” (within the meaning of Article 19) was in St. Catharines, when it was actually in Sarnia at all material times. Accordingly The Board hereby so declares.

The principal issue before us was whether the Board had jurisdiction to award damages against Cord in the absence of any reference to such a process in the Collective Agreement.

Section 126 of the Labour Relations Act reads as follows:

126(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under Section 44, a party to a collective agreement between an employer or employers organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable to the Board for final and binding determination.

In its decision the Board stated that:

...for even if we assume (without deciding) that the Board could, in proceedings under Section 126 of the Act, grant such relief if so empowered by the provisions of the applicable collective agreement, we are not in a position to do so in respect of this grievance because nothing in the Collective Agreement between EPSCA and the Council gives the Board the power to award damages against an employee for improperly claiming or receiving Room and Board Allowance. Accordingly, EPSCA's request for an award of damages against Mr. Cord is hereby dismissed.

Standard of Review

In the Supreme Court of Canada decision of *Re Syndicat des Employes et al and CLRB* (1984), 14 D.L.R. (4th) p.457 the Court discusses the issue of judicial review of a Tribunal which enjoys a privative clause. The decision distinguishes between a “mere error of law” and “a jurisdictional error”, the latter only being reviewable.

At p. 463 the Court states in part that:

a mere error of law is an error committed by an administrative tribunal in good faith in interpreting or applying a provision of its enabling Act...

whereas a jurisdictional error

...relates generally to a provision which confers jurisdiction, that is, one which lists and limits the powers of an administrative tribunal...

The Court went on to stated at p.479 that:

Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reforming power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an appropriate criterion.

That is why the superior courts which exercise the power of judicial review do not and may not use the rule of the patently unreasonable error once they have classified an error as jurisdictional.

Jurisdiction of the Board

Section 126(1) of the Labour Relations Act, referred to earlier, provides that a party to a collective agreement may refer a grievance to the Board for "final and binding arbitration".

Section 45(10) of the Labour Relations Act provides that:

the decision of an arbitration is binding

- (a) upon the parties

and

- (b) upon the employees covered by the agreement who are affected by the decision.

and the parties, employers, trade unions and employees shall do or abstain from doing anything required of them by the decision.

Issue to be determined

The question is whether or not the Board made a jurisdictional error by determining that it did not have the jurisdiction to make the remedial order sought because in its words, "nothing in the Collective Agreement between EPSCA and the Council gives the Board the power to award damages against an employee...".

The Labour Relations Act requires the settlement of disputes over interpretation of collective agreements by arbitration. The applicant submits that the settlement of disputes should include where appropriate an award of damages by the arbitrator if it is established that specific damages occurred as a direct result of a breach of a collective agreement by an employee. In support of this proposition is cited the Supreme Court of Canada decision of *St. Anne-Nackawis Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219* (1986), 28 D.L.R. (4th) where Mr. Justice Estey states at page 12:

The more modern approach is to consider that all labour relations legislation provides a code governing all aspects of labour relations and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to

have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the Legislature has not assigned these tasks.

In *Re Polymer Corporation and Oil, Chemical and Atomic Workers International* (1962), 33 O.L.R. (2d) 24, the Supreme Court of Canada held that it was not necessary for there to be an express power to award damages in a collective agreement for a Board to order such consequential relief.

The respondent unions submit that:

The Board recognized its power under Section 126 of the Act to award damages in an appropriate case but declined to do so in relation to Cord, as an employee, in the proceedings before it in view of the absence of any empowering provision to that effect in the collective agreement.

It is submitted that the Board did not decline its jurisdiction but rather exercised its discretion in deciding not to award damages in the matter before it.

On behalf of the Board itself it is argued that the issue is not about the jurisdiction of the Board but it is simply a matter of the Board interpreting the collective agreement. It is submitted that the Board did not make any finding of a breach of the agreement and that the failure to find a breach did not represent a jurisdictional error. Counsel for the Board submits that the collective agreement simply provided an entitlement to an employee to make a claim for room and board and that dishonesty on the part of the employee was not a violation of the collective agreement. We do not agree with this interpretation of the decision of the Board. We are of the view that the Board did in effect find a breach of the collective agreement when it made a declaration that:

it is abundantly clear that James Cord improperly received Room and Board allowance totalling \$11,650 to which he was not entitled under Article 19 of the Master Portion of the Collective Agreement.

In our opinion the Board did have the jurisdiction to make an award of damages against the employee Cord. As stated earlier, Section 126(1) of the Labour Relations Act provides that a party to a collective agreement may refer a grievance to the Board of "final and binding arbitration". Section 45(10) of the Act provides that the decision of the arbitration is binding "upon the employees covered by the agreement who are affected by the decision".

The Board does, of course, have a discretion in the making of a final determination in relations to a breach of a collective agreement. However in the instant case the Board has fettered its decision by determining that it could only grant such relief as sought by the applicant "if so empowered by the provisions of the applicable collective agreement". The Board stated further that:

we are not in a position to do so in respect of this grievance because nothing in the Collective Agreement between EPSCA and the Council gives the Board the power to award damages against an employee for improperly claiming or receiving room and board allowance.

The only reasonable interpretation of the Board's decision is that it concluded that it did not have any jurisdiction under the Labour Relations Act to grant damages against an employee covered by a collective agreement unless the agreement itself specifically empowered the arbitration board to award damages against an employee. This conclusion amounts to a jurisdictional error and therefore an error in law as we are of the view that the Board declined its jurisdiction to consider an award of damages against the employee Cord, jurisdiction which it had under the provisions of the Labour Relations Act referred to above.

From the Board's reasons it is not clear what their disposition of the matter would have been if

they had assumed jurisdiction. For this reason the matter is remitted to the Board for its determination.

If necessary submissions as to costs may be made in writing within fifteen days.

CASE LISTINGS FEBRUARY 1993

PAGE

1.	Applications for Certification	43
2.	Applications for Combination of Bargaining Units	54
3.	Applications for First Contract Arbitration	54
4.	Applications for Declaration of Related Employer	54
5.	Sale of a Business	55
6.	Union Successor Rights	57
7.	Applications for Declaration Terminating Bargaining Rights	57
8.	Applications for Declaration of Unlawful Strike (Construction Industry)	58
9.	Complaints of Unfair Labour Practice	58
10.	Applications for Interim Order	62
11.	Applications for Consent to Prosecute	62
12.	Applications for Consent to Early Termination of Collective Agreement	62
13.	Trusteeship	62
14.	Jurisdictional Disputes	62
15.	Applications for Determination of Employee Status	63
16.	Complaints under the Occupational Health and Safety Act	63
17.	Construction Industry Grievances	63
18.	Applications for Reconsideration of Board's Decision	68

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1993

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0960-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Empire Masonry Contractors (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Intervener)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of Empire Masonry Contractors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (*Clarity Note*)

1077-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sunlight Bricklayers Ltd. (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Intervener)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of Sunlight Bricklayers Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (*Clarity Note*)

1116-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Keyside Construction Co. Ltd. (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Intervener)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of Keyside Construction Co. Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit) (*Clarity Note*)

1640-92-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Leo Landscaping & Snow Plowing Ltd./Queen's Nursery Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Leo Landscaping and Snowplowing Ltd./Queen's Nursery Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and except non-working foremen and all carpenters and carpenters' apprentices in the employ of Leo Landscaping and Snowplowing Ltd./Queen's Nursery Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham,

excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1870-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Construction Company Limited (Respondent)

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of Ontario Construction Limited in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2082-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Maple Lodge Farms Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Maple Lodge Farms Ltd. employed in its garage at R.R. #2, Norval, Ontario, save and except General Garage Foreman, persons above the rank of General Garage Foreman, driver trainer, and office and clerical staff” (29 employees in unit)

2546-92-R: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Burns International Securities Services Ltd. (Respondent)

Unit: “all security guards employed by Burns International Security Services Ltd. in the Regional Municipality of Hamilton Wentworth, the Town of Milton, the Town of Haldimand, the City of Burlington, the City of Niagara Falls, the City of St. Catharines, the Town of West Lincoln and the Town of Grimsby, save and except site supervisors, persons above the rank of site supervisor, office and sales staff” (276 employees in unit) (*Having regard to the agreement of the parties*)

2818-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Centro Masonry Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices and construction labourers in the employ of Centro Masonry Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

2850-92-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Hystek Contractors Corporation (Respondent)

Unit: “all rodmen in the employ of Hystek Contractors Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2894-92-R: Toronto Greenpeace Staff Association (Applicant) v. Greenpeace Canada (Respondent)

Unit: “all employees of Greenpeace Canada in the Regional Municipality of Metropolitan Toronto, save and except Directors and Coordinators, persons above the rank of Director and Coordinator, canvass personnel, Senior Accountant, Assistant to Operations Director, and the Executive Assistant” (8 employees in unit) (*Having regard to the agreement of the parties*)

2900-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. AMP Waste Systems Inc. (Respondent)

Unit: “all employees of AMP Waste Systems Inc. in the Town of Newmarket, save and except Operations Manager and Sales Manager and persons above the rank of Operations Manager and Sales Manager” (9 employees in unit) (*Having regard to the agreement of the parties*)

2904-92-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A. F. of L., C.I.O., C.L.C. (Applicant) v. The Mennonite Home Association of York County (Respondent)

Unit: “all employees of The Mennonite Home Association of York County at its Parkview Home for the Aged in the Town of Stouffville, save and except Supervisors, persons above the rank of Supervisor, Registered and Graduate Nurses, Physiotherapists, Occupational Therapists, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (58 employees in unit) (*Having regard to the agreement of the parties*)

2927-92-R: Office and Professional Employees International Union (Applicant) v. Ombudsman Ontario (Respondent)

Unit: “all employees of Ombudsman Ontario in the Province of Ontario, save and except Managers or Assistant Directors, persons above the rank of Manager or Assistant Director, Administrative Assistants, Administrative Secretaries to Directors, Legislative Liaison, students involved in co-operative training programs with a high school, college or university and students employed during the school vacation period” (92 employees in unit) (*Having regard to the agreement of the parties*)

2947-92-R: Canadian Union of Public Employees (Applicant) v. Association pour l'integration Sociale d'Ottawa-Carleton (Respondent)

Unit: “all employees of Association pour l'Integration Sociale d'Ottawa-Carleton in the Regional Municipality of Ottawa-Carleton, save and except Team Leaders, persons above the rank of Team Leader and office and clerical staff” (23 employees in unit)

2951-92-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Harvey (Respondent)

Unit: “all employees of The Corporation of the Township of Harvey in the Township of Harvey, save and except Roads Superintendent, Deputy Treasurer and Deputy Clerk, persons above the rank of Roads Superintendent, Deputy Treasurer and Deputy Clerk, office and clerical staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

2952-92-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Cavan (Respondent)

Unit: “all employees of The Corporation of the Township of Cavan in the Township of Cavan, save and except managers and co-ordinator of community services, persons above the rank of managers and co-ordinator of community services, dog control officer and students employed during the school vacation period and office and clerical employees” (8 employees in unit) (*Having regard to the agreement of the parties*)

2960-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Medigas Inc. (Respondent)

Unit: “all employees of Medigas Inc. in the City of Sudbury, save and except supervisors, persons above the rank of supervisor, purchasing agent, outside sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

2963-92-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Dryden and District Association for Community Living (Respondent)

Unit: “all employees of the Dryden and District Association for Community Living in the Town of Dryden, save and except Directors of Service, persons above the rank of Director of Service, Office Manager and office and clerical staff” (33 employees in unit) (*Having regard to the agreement of the parties*)

2972-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Engineered Foam Products Canada Ltd. (Respondent)

Unit: “all employees of Engineered Foam Products Canada Ltd. in the Regional Municipality of Metropolitan Toronto, save and except Foremen, persons above the rank of Foreman, Head of Maintenance, office and sales staff” (25 employees in unit) (*Having regard to the agreement of the parties*)

2974-92-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: “all employees of David Martin Enterprises (London) Limited employed at the Talbot Centre, Talbot Centre Mall, 148 Fullarton Street, 140 Fullarton Street, 465 Richmond Street, London and the Dufferin Corporate Centre, 130 Dufferin Avenue, London, save and except foremen, persons above the rank of foreman, office, engineering, technical and sales staff” (28 employees in unit) (*Having regard to the agreement of the parties*)

2976-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Westway Taxi Nepean Ltd. (Respondent)

Unit: “all employees of Westway Taxi Nepean Ltd. operating taxis as single plate owners, lessees, rental drivers in the Cities of Nepean and Kanata, save and except dispatchers and calltakers, persons above the rank of dispatcher and calltaker, fleet owners and office and clerical staff” (62 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2982-92-R: United Steelworkers of America (Applicant) v. Cooper Industries (Canada) Inc. (Respondent)

Unit: “all employees of Cooper Industries (Canada) Inc. in the City of Stratford, save and except supervisors, persons above the rank of supervisor, office and clerical employees” (48 employees in unit) (*Having regard to the agreement of the parties*)

2988-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Co-operative Housing Federation of Toronto Inc. (Respondent)

Unit: “all employees of Co-operative Housing Federation of Toronto Inc. in the Municipality of Metropolitan Toronto, save and except Directors, persons above the rank of Director, Assistant Executive Director and project site staff” (32 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3003-92-R: International Brotherhood of Painters and Allied Trades - Local 1891 (Applicant) v. Promac Drywall Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Promac Drywall Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Promac Drywall Ltd. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3013-92-R: United Steelworkers of America (Applicant) v. 783720 Ontario Inc. (Respondent)

Unit: “all employees of 783720 Ontario Inc. in its Birchmere Residential Hotel Division in the City of Orillia, save and except supervisors and persons above the rank of supervisor” (34 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3021-92-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - UAW (Applicant) v. Veltri Glencoe Ltd. (Respondent)

Unit: “all employees of Veltri Glencoe Ltd. in the Town of Glencoe, save and except foremen, those above

the rank of foreman, engineering staff, office and clerical staff and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*)

3023-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 221 (Applicant) v. 941115 Ontario Inc. (Respondent)

Unit: “all journeymen and apprentice plumbers and pipefitters in the employ of 941115 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice plumbers and pipefitters in the employ of 941115 Ontario Inc. in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

3042-92-R: Canadian Union of Public Employees (Applicant) v. Unemployed Help Centre of Windsor (Respondent)

Unit: “all employees of the Unemployed Help Centre of Windsor in the County of Essex, save and except supervisors, those above the rank of supervisor, and employees for whom any other trade union holds bargaining rights as of January 23, 1993” (18 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3056-92-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. HGC Management Inc. (Respondent)

Unit: “all employees of HGC Management Inc. in the City of Trenton, save and except Operations Manager, persons above the rank of Operations Manager, office and clerical staff” (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3057-92-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Hugh Garner Housing Co-operative Inc. (Respondent)

Unit: “all employees of Hugh Garner Housing Co-operative Inc. in the Municipality of Metropolitan Toronto, save and except the Board of Directors and persons above the rank of Board Director” (6 employees in unit) (*Having regard to the agreement of the parties*)

3078-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. D & E Wood Industries Ltd. (Respondent)

Unit: “all employees of D & E Wood Industries Ltd. at 6399 and 6385 Netherhart Road in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff” (41 employees in unit) (*Having regard to the agreement of the parties*)

3079-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. M. Martins Masonry (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices, stonemasons, stonemasons’ apprentices and construction labourers in the employ of M. Martins Masonry, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

3099-92-R: Service Employees Union, Local 210 (Applicant) v. Provincial Nursing Home Limited Partnership (Respondent)

Unit #1: “all employees of Provincial Nursing Home Limited Partnership in the Town of Seaforth, save and except supervisors, persons above the rank of supervisor, registered nurses and persons regularly employed

for not more than 24 hours per week and students employed during the school vacation period” (25 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see Applications for Certification Dismissed without vote)

3105-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Nivel Inc. (Respondent)

Unit: “all employees of Nivel Inc. in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager, office and clerical staff and persons regularly employed for not more than 24 hours per week” (29 employees in unit)

3115-92-R: Teamsters Local Union No. 419 (Applicant) v. Rite Pak Produce Co. Limited (Respondent)

Unit: “all employees of Rite Pak Produce Co. Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff” (26 employees in unit) (*Having regard to the agreement of the parties*)

3131-92-R: Teamsters Local Union 938 (Applicant) v. Pepsi-Cola Canada Ltd. (Respondent)

Unit: “all employees of Pepsi-Cola Canada Ltd. in the City of Orillia, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period” (35 employees in unit) (*Having regard to the agreement of the parties*)

3134-92-R: Canadian Union of Public Employees (Applicant) v. Durham Region Non-Profit Housing Corporation (Respondent) v. Group of Employees (Objectors)

Unit: “all superintendents and relief superintendents employed by the Durham Region Non-Profit Housing Corporation in the Regional Municipality of Durham, save and except property managers and persons above the rank of property manager, office and clerical staff” (32 employees in unit) (*Having regard to the agreement of the parties*)

3135-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Toronto Montessori Schools (Respondent)

Unit: “all employees of Toronto Montessori Schools in the Municipality of Toronto, save and except Head, those above the rank of Head, Student Teachers, office, clerical, custodial staff and substitutes” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3143-92-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Carwell Construction Limited (Respondent)

Unit: “all construction labourers in the employ of Carwell Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Carwell Construction Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman ” (5 employees in unit)

3147-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 836541 Ontario Ltd. c.o.b. as LOEB Carleton Place (Respondent)

Unit: “all employees of 836541 Ontario Ltd. c.o.b. as LOEB Carleton Place in the Town of Carleton Place, save and except Department Managers, persons above the rank of Department Manager and office and clerical staff” (97 employees in unit) (*Having regard to the agreement of the parties*)

3148-92-R: Office and Professional Employees International Union (Applicant) v. The Lakehead Board of Education (Respondent)

Unit: “all supply office and clerical employees of The Lakehead Board of Education in the District of Thunder Bay” (39 employees in unit) (Clarity Note) (*Having regard to the agreement of the parties*)

3149-92-R: United Food & Commercial Workers International Union, Local 175 affiliated with the Canadian Labour Congress (Applicant) v. Busch’s Auto Supplies Ltd. (Respondent)

Unit: “all employees of Busch’s Auto Supplies Ltd. in the Town of Fort Frances, save and except shareholders, foremen, persons above the rank of foremen and office staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

3182-92-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Asea Brown Boveri Inc. (Respondent)

Unit: “all employees of Asea Brown Boveri Inc. in its Distribution Switchgear Division in the Town of Milton, save and except supervisors or co-ordinators, persons above the rank of supervisor or co-ordinator, office, clerical, accounting, sales and marketing staff and employees in the research, development and engineering department” (40 employees in unit) (*Having regard to the agreement of the parties*) (Clarity Note)

3187-92-R: United Steelworkers of America (Applicant) v. Mike Doyle’s Gardner Motors Inc. (Respondent)

Unit: “all employees of Mike Doyle’s Gardner Motors Inc. in the City of Sudbury, save and except Managers, persons above the rank of Manager and students employed during the school vacation period” (32 employees in unit) (*Having regard to the agreement of the parties*) (Clarity Note)

3205-92-R: Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, Local Union 172, Restoration Steeplejacks (Applicant) v. Vulcan Method Waterproofing and General Contracting Inc. (Respondent)

Unit: “all masonry restoration employees in the employ of Vulcan Method Waterproofing and General Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all masonry restoration employees in the employ of Vulcan Method Waterproofing and General Contracting Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3225-92-R: Canadian Union of Public Employees (Applicant) v. Labour Community Service Centre Inc. (Respondent)

Unit: “all employees of the Labour Community Service Centre Inc. at its Child Care Division in the County of Essex, save and except supervisors, persons above the rank of supervisor, office and clerical staff, In-Home employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

3244-92-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Liberty Building Services (Respondent)

Unit: “all employees of Liberty Building Services employed at the City Centre, Tower A, 275 Dundas Street, London and Tower B, 380 Wellington Street, London, save and except foremen, persons above the rank of foreman, office, engineering, technical and sales staff” (24 employees in unit) (*Having regard to the agreement of the parties*)

3247-92-R: Ontario Public Service Employees Union (Applicant) v. Corbyville Children’s Home Inc. (Respondent)

Unit: “all employees of Corbyville Children’s Home Inc. in the Township of Thurlow, save and except Super-

visors, persons above the rank of Supervisor and the Secretary to the Executive Director” (20 employees in unit) (*Having regard to the agreement of the parties*)

3265-92-R: Ontario Public Service Employees Union (Applicant) v. Agape Group Homes Inc. (Respondent)

Unit: “all employees of Agape Group Homes Inc. in the City of Sault Ste. Marie, save and except Supervisors, persons above the rank of Supervisor and Secretary to the Executive Director” (12 employees in unit) (*Having regard to the agreement of the parties*)

3282-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Nova Housekeeping Systems Ltd. (Respondent)

Unit: “all employees of Nova Housekeeping Systems Ltd. engaged in cleaning and maintenance at Lincoln Place Nursing Home, 429 Walmer Road, Toronto, save and except supervisory personnel, office and clerical staff and students employed during the school vacation period” (19 employees in unit) (*Having regard to the agreement of the parties*)

3283-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Nova Housekeeping Systems Ltd. (Respondent)

Unit: “all employees of Nova Housekeeping Systems Ltd. engaged in cleaning and maintenance at Kennedy Lodge Nursing Home, 1400 Kennedy Road, Scarborough, save and except supervisory personnel, office and clerical staff and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

3284-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Nova Housekeeping Systems Ltd. (Respondent)

Unit: “all employees of Nova Housekeeping Systems Ltd. engaged in cleaning and maintenance at Christie Park Nursing Home, 33 Christie Street, Toronto, save and except supervisory personnel, office and clerical staff and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

3285-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Nova Housekeeping Systems Ltd. (Respondent)

Unit: “all employees of Nova Housekeeping Systems Ltd. engaged in cleaning and maintenance at Barton Place Nursing Home, 914 Bathurst Street, Toronto, save and except supervisory personnel, office and clerical staff and students employed during the school vacation period” (19 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2792-91-R: United Steelworkers of America (Applicant) v. Meadowcroft Place (York Mills) Limited and Execu-Care Nursing Services Limited and 5M Management Services Limited (Respondent)

Unit: “all employees of Meadowcroft Place (York Mills) Limited and Execu-Care Nursing Services Limited and 5M Management Services Limited located at 1340 York Mills Road in the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	42
Number of persons who cast ballots	39
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	19

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

4015-91-R: Muller's Meats Employees Association (Applicant) v. Muller's Meats Limited (Respondent) v. Retail, Wholesale and Department Store Union AFL:CIO:CLC (Intervener)

Unit: "all employees of Muller's Meats Limited in Niagara Falls, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, drivers" (90 employees in unit)

Number of names of persons on revised voters' list	92
Number of persons who cast ballots	83
Number of ballots marked in favour of applicant	50
Number of ballots marked in favour of intervener	33
Number of names of persons on revised voters' list	89
Number of persons who cast ballots	77
Number of ballots marked in favour of applicant	38
Number of ballots marked in favour of intervener	38
Number of names of persons on revised voters' list	96
Number of persons who cast ballots	91
Number of ballots marked in favour of applicant	55
Number of ballots marked in favour of intervener	36

2548-92-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Carleton Board of Education (Respondent) v. Independent Canadian Transit Union, Local 9 (Intervener)

Unit: "all employees of The Carleton Board of Education engaged in custodial services, maintenance and plant operations, save and except supervisors of maintenance and operations, persons above the rank of supervisor of maintenance and operations, office and clerical staff, persons employed under a work incentive program sponsored by other than the employer, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, persons for whom any trade union held bargaining rights as of November 27, 1992" (394 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	430
Number of persons who cast ballots	332
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	320
Number of ballots marked in favour of applicant	213
Number of ballots marked against applicant	107
Number of ballots segregated and not counted	12

2556-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. F. H. Strasler Holding Inc. directing business as Brown Bros. Funeral Homes (Respondent)

Unit: "all employees of Strasler Holding Inc. in Metropolitan Toronto and Mississauga, Ontario, save and except General Manager, persons above the rank of General Manager and office and clerical staff" (17 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	7

2683-92-R: International Union of Operating Engineers, Local 796 (Applicant) v. Les Gestions d'Entretien Menager Soulard Ltee. Soulard Janitorial Management Services Ltd. (Respondent)

Unit: "all employees of Soulard Janitorial Management Services Ltd. at the Ottawa General Hospital in the City of Ottawa, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and per-

sons for whom any trade union held bargaining rights on the date of application, December 3, 1992” (84 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	84
Number of persons who cast ballots	76
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	76
Number of ballots marked in favour of applicant	71
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

0552-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Argcen Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all office, clerical and sales employees of the March Food Services division of Argcen Inc. in the City of Windsor, save and except supervisors, persons above the rank of supervisor, salespersons, Buyers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (26 employees in unit)

2433-92-R: Practical Nurses Federation of Ontario (Applicant) v. Strathroy Middlesex General Hospital (Respondent) (116 employees in unit)

2774-92-R: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Luso Toronto Masonry Ltd. (Respondent) (8 employees in unit)

3049-92-R: Ontario Secondary School Teachers Federation (Applicant) v. Carleton Board of Education (Respondent) (16 employees in unit)

3050-92-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Ltd. (Respondent) (100 employees in unit)

3076-92-R: Canadian Union of Public Employees (Applicant) v. Central Seven Association for Community Living (Respondent) (28 employees in unit)

3099-92-R: Service Employees Union, Local 210 (Applicant) v. Provincial Nursing Home Limited Partnership (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: “all employees of Provincial Nursing Home Limited Partnership in the Town of Seaforth, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and registered nurses” (28 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0298-92-R: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Disegno Co. Inc. (Respondent) v. Bricklayers Masons Independent Union of Canada Local 1 (Intervener)

Unit #1: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Disegno Co. Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the

Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2794-92-R: Graphic Communications International Union, Local 500M (Applicant) v. St. Joseph Printing Limited (Respondent)

Unit #1: “all employees of St. Joseph Printing Limited in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, security guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (210 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	210
Number of persons who cast ballots	191
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	179
Number of segregated ballots cast by persons whose names appear on voter’s list	11
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	51
Number of ballots marked against applicant	127
Number of ballots segregated and not counted	12

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1041-91-R: United Food and Commercial Workers International Union AFL-CIO-CLC (Applicant) v. Canadian Banklock Service Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all service technicians of Canadian Banklock Service Ltd. working in the Province of Ontario, save and except supervisors and persons above the rank of supervisor” (14 employees in unit)

Number of names of persons on revised voters’ list	9
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6

2279-92-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Duron Ontario Ltd. (Respondent)

Unit: “all employees of Duron Ontario Ltd. in its plant in the City of Mississauga, Ontario, save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff” (4 employees in unit)

Number of names of persons on revised voters’ list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2

Applications for Certification Withdrawn

0893-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. C. Santos Masonry (Respondent)

2143-92-R: Local 357, Kitchener, Ontario, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. The Princess Cinema Inc., Waterloo, Ontario (Respondent)

2432-92-R: International Union of Bricklayers and Allied Craftsmen, Local No. 7 (Applicant) v. Canvar Construction (1991) Inc. (Respondent)

2999-92-R: International Ladies Garment Workers Union (Applicant) v. Nouvelle Pertemps Co. Ltd. (Respondent)

3136-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. McDonnell Douglas Canada Ltd. (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

3177-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rowad Pipeline Company Ltd. (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

2943-92-R: Communications, Energy and Paperworkers Union of Canada (Formerly Energy and Chemical Workers Union) (Applicant) v. Servico Limited (Respondent) (*Withdrawn*)

3119-92-R: Service Employees Union, Local 210 (Applicant) v. Provincial Nursing Home Limited Partnership (Respondent) (*Dismissed*)

Unit: "all employees of Seaforth Manor, located in Seaforth, Ontario, save and except, Supervisor, Persons above the rank of Supervisor, Registered Nurses and Students."

FIRST AGREEMENT - DIRECTION

0596-92-FC: Canadian Union of Public Employees, Local 3261 (Applicant) v. The Governing Council of the University of Toronto (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0202-92-R: Labourers International Union of North America, Local 493 (Applicant) v. Acme Building & Construction Limited, Excel Construction (Sudbury) Ltd., Norcon Industries Inc. (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener) (*Granted*)

1191-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building & Construction Limited, Norcon Industries Inc. and Excel Construction (Sudbury) Ltd. (Respondents) (*Granted*)

1450-92-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Acme Building & Construction Limited, Conform Inc., Conform (Ont) Inc., DDS Forming Ltd. (Respondents) v. United Brotherhood of Carpenters and Joiners of America, local 2486 (Intervener) (*Withdrawn*)

1902-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building & Construction Limited, Conform Inc., Conform (Ont) Inc., DDS Forming Ltd., P.B. Rombough (1990) Ltd. (Respondents) (*Withdrawn*)

1684-92-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Pan-Can Painting Limited and Pan-Can Painting (1989) Limited (Respondents) (*Dismissed*)

1813-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Gorf Contracting Limited and Gorf Contracting (1982) Ltd. (Respondents) (*Granted*)

2000-92-R: National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-

Canada) and its Local 1987 (Applicant) v. Kawartha Plastics Ltd. and Formax Enterprises Ltd. (Respondents) (*Dismissed*)

2224-92-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Queen's Nursery Inc. and Leo Landscaping & Snowplowing Ltd. (Respondents) (*Granted*)

2240-92-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mag Dry Wall Ltd. and Redan Dry Wall Inc. (Respondents) (*Withdrawn*)

2298-92-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Retaylor's Interiors Inc. and 963554 Ontario Inc. (Respondents) (*Granted*)

2507-92-R: Service Employees Union, Local 210 (Applicant) v. Livingston International Inc./Mendelssohn Custom Brokers (Respondents) (*Withdrawn*)

2746-92-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Concord Building Supplies Limited, Concord Drywall & Acoustics Corp. and APA Drywall & Acoustics Limited (Respondents) (*Granted*)

2908-92-R: International Union of Bricklayer and Allied Craftsmen Local 2, Ontario (Applicant) v. Limen Masonry Limited and Shore Masonry Inc. (Respondents) (*Granted*)

2955-92-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mag Dry Wall Ltd. and Redan Dry Wall Inc. (Respondents) (*Withdrawn*)

2957-92-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Malvern Drywall Systems Ltd. and 950337 Ontario Inc. c.o.b. as Lakeridge Acoustics (Respondents) (*Granted*)

2964-92-R: United Steelworkers of America (Applicant) v. Birchmere Retirement Residence, and/or any of Birchmere Residential Hotel, Ontario Company 783720, Birchmere Hotel Limited, Ontario Company 29669, The Birchmere of Orillia Limited, Ontario Company 214942, Birchmere Properties Limited, Ontario Company 54040, Birchmere, Ontario Company 12859539, Gordon Smith, Norman Smith (Respondents) (*Withdrawn*)

3017-92-R: United Steelworkers of America (Applicant) v. Polar Fireplaces Inc., Polar Glass & Mirror Inc., Polar Glass & Mirror Inc. c.o.b. as Polar DGM (Respondents) (*Withdrawn*)

3039-92-R: United Brotherhood of Carpenters and Joiners of America Local 2486 (Applicant) v. Perwin Construction Co. Limited, Perwin Project Management Inc., The Ontario Camp for the Deaf (Respondents) (*Granted*)

3082-92-R: Labourers' International Union of North America, Local 506 (Applicant) v. Cobi Concrete Cutting Ltd., Cobi Concrete Construction Ltd. and 1000060 Ontario Ltd. c.o.b. as Cobi Concrete Sawing (Respondents) (*Withdrawn*)

3223-92-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Malvern Drywall Systems Ltd. and 950337 Ontario Inc. c.o.b. as Lakeridge Acoustics (Respondents) (*Granted*)

3334-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Dontex Construction Ltd. and/or G.M.S.N. Construction Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0202-92-R: Labourers International Union of North America, Local 493 (Applicant) v. Acme Building &

Construction Limited, Excel Construction (Sudbury) Ltd., Norcon Industries Inc. (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener) (*Granted*)

1191-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building & Construction Limited, Norcon Industries Inc. and Excel Construction (Sudbury) Ltd. (Respondents) (*Granted*)

1450-92-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Acme Building & Construction Limited, Conform Inc., Conform (Ont) Inc., DDS Forming Ltd., (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener) (*Withdrawn*)

1684-92-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Pan-Can Painting Limited and Pan-Can Painting (1989) Limited (Respondents) (*Dismissed*)

1814-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Gorf Contracting Limited and Gorf Contracting (1982) Ltd. (Respondents) (*Dismissed*)

2000-92-R: National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1987 (Applicant) v. Kawartha Plastics Ltd. and Formax Enterprises Ltd. (Respondents) (*Dismissed*)

2239-92-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mag Dry Wall Ltd. and Redan Dry Wall Inc. (Respondents) (*Withdrawn*)

2281-92-R: Hotel Employees' and Restaurant Employees' Union Local 604, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Walsh's (Respondents) (*Withdrawn*)

2299-92-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Retaylor's Interiors Inc. and 963554 Ontario Inc. (Respondents) (*Withdrawn*)

2424-92-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Accomodex Franchise Management Inc., Kelloryn Hotel Inc. (Respondents) v. United Food & Commercial Workers International Union, Local 206 (Intervener) (*Granted*)

2747-92-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Concord Building Supplies Limited, Concord Drywall & Acoustics Corp. and APA Drywall & Acoustics Limited (Respondents) (*Withdrawn*)

2908-92-R: International Union of Bricklayer and Allied Craftsmen Local 2, Ontario (Applicant) v. Limen Masonry Limited and Shore Masonry Inc. (Respondents) (*Granted*)

2955-92-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mag Dry Wall Ltd. and Redan Dry Wall Inc. (Respondents) (*Withdrawn*)

2957-92-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Malvern Drywall Systems Ltd. and 950337 Ontario Inc. c.o.b. as Lakeridge Acoustics (Respondents) (*Granted*)

3039-92-R: United Brotherhood of Carpenters and Joiners of America Local 2486 (Applicant) v. Perwin Construction Co. Limited, Perwin Project Management Inc., The Ontario Camp for the Deaf (Respondents) (*Granted*)

3082-92-R: Labourers' International Union of North America, Local 506 (Applicant) v. Cobi Concrete Cutting Ltd., Cobi Concrete Construction Ltd. and 1000060 Ontario Ltd. c.o.b. as Cobi Concrete Sawing (Respondents) (*Withdrawn*)

3223-92-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Malvern Drywall Systems Ltd. and 950337 Ontario Inc. c.o.b. as Lakeridge Acoustics (Respondents) (*Granted*)

3334-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Dontex Construction Ltd. and/or G.M.S.N. Construction Ltd. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2656-92-R; 2661-92-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. MacMillan Bathurst Inc., Jerry Heffernan (Respondents); Communications, Energy and Paperworkers Union of Canada Local 1199 (Applicant) v. MacMillan Bathurst Inc., Jerry Heffernan (Respondents) (*Dismissed*)

2690-92-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Trilake Timber Company Ltd. and Canadian Paperworkers Union (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0305-92-R: John Deforge (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Respondent) v. Acme Building and Construction Limited (Intervener) (*Withdrawn*)

0372-92-R: Rudy Denis (Applicant) v. Labourers International Union of North America, Ontario Provincial District Council on behalf of its Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (Respondent) v. Acme Building and Construction Limited (Intervener) (*Withdrawn*)

0504-92-R: Mario Maola (Applicant) v. The Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (Respondent) v. 713537 Ontario Inc. c.o.b. H. T. Lawrence Excavating and 756298 Ontario Ltd. c.o.b. Lawrence Construction (Interveners) (*Granted*)

Unit: "all construction labourers in the employ of 713537 Ontario Inc. c.o.b. as H.T. Lawrence Excavating and 756298 Ontario Ltd. c.o.b. as Lawrence Construction in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

2851-92-R: The Employees of Cashway Building Centres Chatham, Ontario (Applicant) v. United Food and Commercial Workers International Union Local 175 (Respondent) v. Federal Industries Consumer Groups Inc. c.o.b. as Cashway Building Centres (Intervener) (*Granted*)

Unit: "all employees of Federal Industries Consumer Groups Inc. c.o.b. as Cashway Building Centres in the Township of Chatham, save and except forepersons, persons above the rank of foreperson, and office and clerical staff" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of respondent	0

Number of ballots marked against respondent
 Number of ballots segregated and not counted

10
 0

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3392-92-U: Torino Drywall Systems (Applicant) v. Drywall, Acoustic Lathing and Insulation, Local 675 of the United Brotherhood of Carpenters and Joiners of America, Gus Simone, Ivan Ivanavic and International Brotherhood of Painters and Allied Trades, Local Union 1891 (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3310-90-U: Donald Earhart (Applicant) v. United Brotherhood of Carpenters, Local 494, and Jim Caron; Mckay-Cocker Construction Limited (Respondents) (*Dismissed*)

2733-91-U; 4006-91-U: United Food and Commercial Workers International Union, Local 633 (Applicant) v. Barton Feeders Inc. (Respondent) (*Granted*)

3235-91-U: United Steelworkers of America (Applicant) v. Meadowcroft Place (York Mills) Limited and Execu-Care Nursing Services Limited and 5M Management Services Limited; Gerald Pettle; Susan Pettle (Respondents) (*Withdrawn*)

0496-92-U: Labourers International Union of North America, Ontario Provincial District Council on behalf of its Local Unions, 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (Applicant) v. Acme Building & Construction Limited; Norcon Industries Inc. (Respondents) (*Withdrawn*)

0560-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service and Deenis Donkervoort and Kellie Toole (Respondents) (*Withdrawn*)

0832-92-U: Rolly Simoneau (Applicant) v. International Brotherhood of Painters and Allied Trades (Respondent) (*Withdrawn*)

1312-92-U: Mikeal Kaldflieck (Applicant) v. Sean O’Ryan & Local 46 of United Association of Plumbers and Pipefitters of America (Respondents) (*Dismissed*)

1432-92-U: Joseph Simler (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada) and its local 29 (Respondent) v. Consumers Glass (Intervener) (*Dismissed*)

1773-92-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building & Construction Limited, Norcon Industries Inc. (Respondents) (*Withdrawn*)

1774-92-U: The Ontario Secondary School Teachers’ Federation (Applicant) v. The Kent County Board of Education (Respondent) (*Withdrawn*)

1868-92-U; 2173-92-U; 2229-92-U: Canadian Union of Public Employees, Local 1344 (Applicant) v. The Board of Education for the City of Hamilton (Respondent) (*Withdrawn*)

1876-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 598142 Ontario Limited c.o.b. as Spooners Restaurant, Jim Raglan and Joe Kieffer (Respondents) (*Dismissed*)

1897-92-U: Kenrick Watson (Applicant) v. C.A.W. Canada, Local 1451 (Respondent) v. Budd Canada Inc. (Intervener) (*Granted*)

1911-92-U: International Brotherhood of Electrical Workers, Local Union 1230 (Applicant) v. Brouillette's Manor Limited (Respondent) (*Withdrawn*)

1912-92-U: Craig Sindall (Applicant) v. The Custodial & Maintenance Association (C.A.M.A.) (Respondent) (*Withdrawn*)

2022-92-U: United Rubber Workers Local 455 (Applicant) v. Gencorp Canada Inc. (Respondent) (*Withdrawn*)

2120-92-U: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Marcor Personnel Inc. (Respondent) (*Withdrawn*)

2123-92-U: Aline Isabelle (Applicant) v. Local 3367, Canadian Union of Public Employees and William W. Creighton Centre (Respondents) (*Withdrawn*)

2160-92-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Locals 240 and 195 (Applicant) v. Automotive Plastic Technologies, Inc. (Respondent) (*Dismissed*)

2161-92-U: Christian Labour Association of Canada (Applicant) v. Second Avenue Lodge Inc. c.o.b. as Marsdale Senior Centre (Respondent) (*Withdrawn*)

2180-92-U: Ontario Public School Teachers' Federation (Applicant) v. Leeds and Grenville County Board of Education (Respondent) (*Granted*)

2284-92-U: Angello Malamas (Applicant) v. Borai Abdelrahman (Respondent) (*Withdrawn*)

2505-92-U: Angello Malamas (Applicant) v. Nabil Abdelrahman, Borai Abdelrahman (Respondents) (*Withdrawn*)

2506-92-U: Angello Malamas (Applicant) v. Union Local 75 (Respondent) (*Withdrawn*)

2689-92-U: United Steelworkers of America (Applicant) v. Concorde Distribution Systems (Respondent) (*Withdrawn*)

2730-92-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 357 (Applicant) v. The Princess Cinema Inc. (Respondent) (*Withdrawn*)

2778-92-U: International Union of Operating Engineers, Local 793 (Applicant) v. Beaver Road Builders Ltd. (Respondent) (*Withdrawn*)

2802-92-U: Mr. J. Johnston (Applicant) v. The Great Atlantic and Pacific Company, Limited (Respondent) (*Dismissed*)

2819-92-U: Robert Shody (Applicant) v. United Steelworkers of America, Local 6662 (Respondent) (*Withdrawn*)

2869-92-U: Theodore (Ted) Moreau (Applicant) v. United Steelworkers of America, Local 9171 (Respondent) v. Placer Dome Inc., Detour Lake Mine (Intervener) (*Withdrawn*)

2909-92-U: Blaine Garson (Applicant) v. Local 95 and/or Crossby Insulations (Respondents) (*Withdrawn*)

2911-92-U: United Food & Commercial Workers International Union, Local 175/633 (Applicant) v. 810048 Ontario Ltd. c.o.b. as Loeb IGA Highland (Respondent) (*Granted*)

2925-92-U: United Steelworkers of America (Applicant) v. Meadowcroft Place (York Mills) Limited/Execu-Care Nursing Services Limited/5m Management Services Limited (Respondents) (*Withdrawn*)

2929-92-U: Labourers' International Union of North America, Local 183 (Applicant) v. Maccaferri Gabions of Canada Ltd. (Respondent) (*Withdrawn*)

2953-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Mossman's Appliance Parts Limited (Respondent) (*Withdrawn*)

2966-92-U: Angello Malamas (Applicant) v. J. Guy Belanger, President Administrator (Respondent) (*Withdrawn*)

2977-92-U: Faiz Bhuiyan (Applicant) v. Borai Abdelrahman (Respondent) (*Withdrawn*)

2983-92-U: Communications, Energy and Paperworkers Union Local 304 (Applicant) v. Sunworthy Wallcoverings, Division of the Borden Company Limited (Respondent) (*Withdrawn*)

2989-92-U: Teamsters Local Union No. 879 (Applicant) v. Crane Canada Inc. (Crane Supply Division) (Respondent) (*Withdrawn*)

3000-92-U: International Ladies Garment Workers Union (Applicant) v. Nouvelle Pertemps Co. Ltd. (Respondent) (*Withdrawn*)

3006-92-U: Ernest Pardy (Applicant) v. United Food and Commercial Workers International Union, United Food and Commercial Workers Local 617P (Respondents) (*Withdrawn*)

3043-92-U: United Food & Commercial Workers Union, Local 175/633 (Applicant) v. Bancroft I.G.A. (Respondent) (*Withdrawn*)

3047-92-U: Thomas Janosik (Applicant) v. Labourer's International Union of North America, Local 183 (Respondent) (*Withdrawn*)

3048-92-U: Peter Musgreave (Applicant) v. Labourer's International Union of North America, Local 183 (Respondent) (*Withdrawn*)

3061-92-U: IWA Canada, Local 2693 (Applicant) v. Coretech/Sonoco Limited (Respondent) (*Withdrawn*)

3070-92-U: Rosslyn Alexander (Applicant) v. Service Employee International Union (Respondent) (*Withdrawn*)

3075-92-U: Victoria Clarke (Applicant) v. Sharon Foulds, Ontario Nurses Association, Andrea Boswell, Manager (Respondents) (*Withdrawn*)

3083-92-U: Filippo De Panfilis (Applicant) v. Ontario Store Fixtures Inc. (Respondent) (*Dismissed*)

3085-92-U: Arthur Witt (Applicant) v. Tri-Clover Canada Ltd. (Ladish) (Respondent) (*Dismissed*)

3094-92-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. The Brick Warehouse Corporation (Respondent) (*Withdrawn*)

3096-92-U: Sergio Lopes (Applicant) v. Chestnut Park Hotel (Respondent) (*Withdrawn*)

3106-92-U: Donald John Jemmett (Applicant) v. Teamsters Union, Branch #938 (Respondent) (*Dismissed*)

3130-92-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Scepter/Canron Inc. (Respondent) (*Withdrawn*)

3142-92-U: HGC Management Inc. (Applicant) v. Communications, Energy and Paperworkers Union of Canada (Respondent) (*Dismissed*)

3145-92-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. D & E Wood Industries Ltd. (Respondent) (*Withdrawn*)

3151-92-U: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent) (*Withdrawn*)

3181-92-U: United Food and Commercial Workers International Union, AFL-CIO-CLC, Local 1000A (Applicant) v. The Greek Community of Metropolitan Toronto Inc. (Respondent) (*Withdrawn*)

3209-92-U: Canadian Union of Public Employees (Applicant) v. Unger Nursing Homes Ltd. (Respondent) (*Withdrawn*)

3210-92-U: Canadian Union of Public Employees (Applicant) v. Unger Nursing Homes Ltd. (Respondent) (*Withdrawn*)

3211-92-U: Canadian Union of Public Employees (Applicant) v. Unger Nursing Homes Ltd. (Respondent) (*Withdrawn*)

3212-92-U: Canadian Union of Public Employees (Applicant) v. Unger Nursing Homes Ltd. (Respondent) (*Withdrawn*)

3213-92-U: Canadian Union of Public Employees (Applicant) v. Unger Nursing Homes Ltd. (Respondent) (*Withdrawn*)

3214-92-U: Canadian Union of Public Employees (Applicant) v. Unger Nursing Homes Ltd. (Respondent) (*Withdrawn*)

3215-92-U: Canadian Union of Public Employees (Applicant) v. Unger Nursing Homes Ltd. (Respondent) (*Withdrawn*)

3216-92-U: Canadian Union of Public Employees (Applicant) v. Manuel Soares Janitorial Services Ltd. (Respondent) (*Withdrawn*)

3217-92-U: Canadian Union of Public Employees (Applicant) v. Manuel Soares Janitorial Services Ltd. (Respondent) (*Withdrawn*)

3218-92-U: Canadian Union of Public Employees (Applicant) v. Manuel Soares Janitorial Services Ltd. Unger Nursing Homes Ltd. (Respondents) (*Withdrawn*)

3220-92-U: Daniel Fortin (Applicant) v. Garth Craig, business representative of the Teamsters Local 938 (Respondent) (*Withdrawn*)

3337-92-U; 3339-92-U; 3341-92-U: Benjamin Leong (Applicant) v. Delta Chelsea Management (Respondent); Frankie Das (Applicant) v. Delta Chelsea Inn Management (Respondent); Lans Merchant (Applicant) v. Wayne Taylor, Jose Esquada, Rajeev Khudja of the Delta Chelsea Inn (Respondents) (*Dismissed*)

3338-92-U: Faiz Bhuiyan (Applicant) v. Union Local 75, Cledwyn Longe - Business Representative (Respondents) (*Withdrawn*)

3342-92-U: Frank Panacci (Applicant) v. Rajeev Khudja, Jose Esquada, Wayne Taylor - Delta Chelsea Inn Managers (Respondents) (*Withdrawn*)

3382-92-U: Sam Adorno (Applicant) v. UMACS of Canada Inc. (Respondent) (*Dismissed*)

3383-92-U: Joe Pounce (Applicant) v. Kathanne Services Inc. (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

3098-92-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Mississauga Hydro-Electric Commission (Respondent) (*Withdrawn*)

3152-92-M: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - U.A.W. (Applicant) v. Morrison Meat Packers Ltd. (Respondent) (*Dismissed*)

3186-92-M: United Steelworkers of America (Applicant) v. Cooper Industries (Canada) Inc., Wagner Canada Division (Respondent) (*Granted*)

3207-92-M: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Granted*)

3378-92-M: United Food and Commercial Workers International Union (Applicant) v. Parkway Complex (Respondent) (*Withdrawn*)

3416-92-M: Drywall Acoustic Lathing and Insulation Local 675 and International Brotherhood of Painters and Allied Trades and Local Union 1891 (Applicant) v. Torino Drywall Systems (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

3261-91-U: United Steelworkers of America (Applicant) v. Meadowcroft Place (York Mills) Limited and Execu-Care Nursing Services Limited and 5M Management Services Limited; Gerald Pettie; Susan Pettie (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3088-92-M: Burndy Inc. (Applicant) v. International Association of Machinists and Aerospace Workers, Local Lodge 2546 (Respondent) (*Granted*)

TRUSTEESHIP

3021-91-T; 3022-91-T; 3023-91-T; 3691-91-T: Canadian Paperworkers Union (Applicant) v. Canadian Paper Workers Union Local 1199 (Respondent); Canadian Paperworkers Union (Applicant) v. Canadian Paperworkers Union, Local 309 (Respondent); Canadian Paperworkers Union (Applicant) v. Canadian Paperworkers Union, Local 934 (Respondent); The Canadian Paperworkers Union (Applicant) v. Canadian Paperworkers Union, Local 1335 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2664-89-JD: Millwrights District Council of Ontario, on its own behalf and on behalf of its Local 1425 (Applicant) v. Commonwealth Construction Company; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508 (Respondents) (*Granted*)

0630-92-JD: International Association of Bridge, Structural and Ornamental Iron Workers, International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Electrical Power Systems Construction Association, Canadian General Electric Limited, Getsco Technical Services Inc., United Brotherhood of Carpenters and Joiners of America, Local 1592 (Respondents) (*Withdrawn*)

2158-92-JD: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 269 (Applicant) v. E.S. Fox Limited, United Association of Journeymen & Apprentices of

the Plumbing & Pipefitting Industry of the United States and Canada, Local Union 463 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1213-92-M: F. J. Davey Home for the Aged (Applicant) v. Ontario Nurses Association (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0002-92-OH: Richard Petitpas (Applicant) v. Christie Brown & Co. Ltd. (Respondent) (*Dismissed*)

1540-92-OH: Addy Fong (Applicant) v. Strong Plastics Manufacturing Inc. (Respondent) (*Withdrawn*)

2306-92-OH: Gary K. Arsenault (Applicant) v. Hamilton Street Railway Company (Respondent) v. Paul Clark (Intervener) (*Withdrawn*)

3086-92-OH: Filippo De Panfilis (Applicant) v. Ontario Store Fixtures (Respondent) (*Dismissed*)

3233-92-OH: Frederick Paul Brock (Applicant) v. Pannell Veneer (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1227-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Honeywell Limited (Respondent) (*Granted*)

1525-91-G: Sheet Metal Workers' International Association, Local 269 (Applicant) v. E.S. Fox Limited (Respondent) v. Millwrights District Council of Ontario on its own behalf and on behalf of Local 1410 (Intervener) (*Withdrawn*)

2069-91-G; 2070-91-G; 2406-91-G; 2071-91-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. The Electrical Power Systems Construction Association, W.K.R.D. Utility Construction Inc. (Respondents); Sheet Metal Workers' International Association, Local 30 (Applicant) v. The Electrical Power Systems Construction Association, Mark O'Connor Disposal Demolition Ltd. (Respondents); Sheet Metal Workers' International Association, Local 473 (Applicant) v. The Electrical Power Systems Construction Association, Mark O'Connor Disposal Demolition Ltd. (Respondents) (*Withdrawn*)

3132-91-G; 3829-91-G: International Union of Operating Engineers and its Local 793 (Applicant) v. Custom Concrete Northern Ltd. (Respondent); International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its Local 230 (Applicant) v. Custom Concrete Northern Ltd. (Respondent) (*Dismissed*)

3160-91-G: The Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) v. Canadian Union of Public Employees, Local 1000 (Intervener) (*Withdrawn*)

3500-91-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Co. Ltd. (Respondent) (*Dismissed*)

3767-91-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Pan-Can Painting (1989) Ltd. (Respondent) (*Granted*)

0215-92-G; 0457-92-G; 1772-92-G: Labourers International Union of North America, Local 493 (Applicant) v. Acme Building & Construction Limited, Excel Construction (Sudbury) Ltd., Norcon Industries Inc. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building

& Construction Limited, Excel Construction (Sudbury) Ltd., Norcon Industries Inc. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building & Construction Limited (Respondent) (*Granted*)

0619-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Electrical Power Systems Construction Association, Canadian General Electric Limited, Getsco Technical Services Inc., United Brotherhood of Carpenters and Joiners of America, Local 1592 (Respondents) (*Withdrawn*)

0681-92-G: International Association of Bridge, Structural and Ornamental Iron Workers and International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Electrical Power Systems Construction Association, Kel-Gor Limited, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Withdrawn*)

1194-92-G: United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Peran Contracting (1987) Inc. and/or Peran Contracting Inc. (Respondent) (*Granted*)

1242-92-G: Quality Control Council of Canada (Applicant) v. Protech Industrial Group Inc. (Respondent) (*Granted*)

1324-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. Starline Cement Finishing Co. Ltd. (Respondent) (*Granted*)

1561-92-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. National Grocers (Respondent) (*Withdrawn*)

1801-92-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Tall Masonry & Sons Ltd., (New Tall Masonry) (Respondent) (*Granted*)

1856-92-G: United Brotherhood of Carpenters and Joiners of America Local 2041 (Applicant) v. Standard Drywall Limited (Respondent) (*Withdrawn*)

2177-92-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Co. Ltd. (Respondent) (*Withdrawn*)

2178-92-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Gaspo Construction Ltd. (Respondent) (*Granted*)

2241-92-G; 2243-92-G: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Redan Dry Wall Inc. (Respondent) (*Withdrawn*)

2242-92-G; 2244-92-G: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mag Dry Wall Ltd. (Respondent) (*Withdrawn*)

2297-92-G: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Retaylor's Interiors Inc. and 963554 Ontario Inc. (Respondents) (*Granted*)

2301-92-G: Labourers' International Union of North America, Local 493 (Applicant) v. KONA Builders Limited (Respondent) (*Withdrawn*)

2406-92-G: Bricklayers, Masons Independent Union of Canada - Local 1 (Applicant) v. Select Masonry Limited (Respondent) (*Withdrawn*)

2612-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Milvan Ironworks (Respondent) (*Granted*)

2641-92-G; 2642-92-G; 3167-92-G; 3168-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Green-Hart Construction (Respondent) (*Granted*)

2674-92-G; 2704-92-G; 2705-92-G; 2706-92-G; 2707-92-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. R. M. Belanger Limited (Respondent) (*Granted*)

2748-92-G; 2749-92-G: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Concord Building Supplies Limited, Concord Drywall & Acoustics Corp., APA Drywall & Acoustics Limited (Respondents) (*Granted*)

2792-92-G: International Union of Bricklayers and Allied Craftsmen Local No. 7, Canada (Applicant) v. De Marinis (DMA) Incorporated (Respondent) (*Withdrawn*)

2907-92-G: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Limen Masonry Limited and Shore Masonry Inc. (Respondents) (*Granted*)

2973-92-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Delrey Contractors Ltd. (Respondent) (*Withdrawn*)

2979-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bondfield Construction Company (1983) Limited (Respondent) (*Granted*)

2984-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. D. Gambini Carpenters Ltd. (Respondent) (*Withdrawn*)

2990-92-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Comstock Canada (Respondent) (*Withdrawn*)

2994-92-G: United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Ellis-Don Construction Ltd. and Ellis-Don Forming Limited (Respondents) (*Granted*)

3001-92-G: Ironworkers District Council of Ontario and its Local 721 (Applicant) v. G. B. Metals Limited (Respondent) (*Granted*)

3007-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. McNaughton Electric Limited (Respondent) (*Granted*)

3010-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. John W. Baldwin Electric Company Limited (Respondent) (*Withdrawn*)

3029-92-G: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mag Dry Wall Ltd. and Redan Dry Wall Inc. (Respondents) (*Withdrawn*)

3040-92-G: United Brotherhood of Carpenters and Joiners of America Local 2486 (Applicant) v. Perwin Construction Co. Limited, Perwin Project Management Inc., The Ontario Camp for the Deaf (Respondents) (*Granted*)

3053-92-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Dielco Industrial Contractors Ltd. (Respondent) v. Millwright District Council of Ontario on its own behalf and on behalf of Local 1592 (Intervener) (*Granted*)

3059-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Abel Metal Limited (Respondent) (*Granted*)

3068-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Mohawk Services (Respondent) (*Granted*)

3073-92-G: Sheet Metal Workers International Association, Local 504 (Applicant) v. Metalbestos Erectors Limited (Respondent) (*Granted*)

3080-92-G: Labourers' International Union of North America, Local 506 (Applicant) v. 1000060 Ontario Ltd. c.o.b. as Cobi Concrete Sawing (Respondent) (*Granted*)

3081-92-G: Labourers' International Union of North America, Local 506 (Applicant) v. Cobi Concrete Cutting Ltd. (Respondent) (*Withdrawn*)

3087-92-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Montgomery Kone Elevator Co. Ltd. (Respondent) (*Withdrawn*)

3091-92-G: The Ontario Provincial Council of Carpenters; and Locals 2486, 1316, 785 and 2222, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Drycoustic Construction Ltd. (Respondent) (*Granted*)

3100-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Florida Ceilings Systems Ltd. (Respondent) (*Withdrawn*)

3101-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mississauga Cement Forming Ltd. (Respondent) (*Granted*)

3102-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Devon Structural Ltd. (Respondent) (*Withdrawn*)

3111-92-G: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Code 1 Investments Inc. (Respondent) (*Granted*)

3112-92-G; 3114-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Murphy Construction (Respondent) (*Granted*)

3123-92-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Belmont Plastering Co. Ltd. (Respondent) (*Withdrawn*)

3126-92-G: Iron Workers District Council of Ontario and its Local 721 (Applicant) v. G. B. Metals Limited (Respondent) (*Withdrawn*)

3163-92-G: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Villa Verde L. M. Masonry Ltd. (Respondent) (*Granted*)

3171-92-G: Labourers' International Union of North America Local 1081 (Applicant) v. Rockwall Concrete Forming (London) Limited (Respondent) (*Withdrawn*)

3176-92-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Queenslea Drywall & Acoustics Limited (Respondent) (*Withdrawn*)

3183-92-G: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Malvern Drywall Systems Ltd. and 950337 Ontario Inc. c.o.b. as Lakeridge Acoustics (Respondents) (*Granted*)

3188-92-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Baur Ceramics (Respondent) (*Granted*)

3189-92-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. A.B.T. Tile and Marble Ltd. (Respondent) (*Granted*)

- 3190-92-G:** International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Universal Ceramic and Tile Ltd. (Respondent) (*Granted*)
- 3191-92-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sullivan Installations (Respondent) (*Withdrawn*)
- 3194-92-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Seaton Creative Interiors Ltd. (Respondent) (*Withdrawn*)
- 3195-92-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. B E S Re-Bar (Respondent) (*Withdrawn*)
- 3198-92-G; 3199-92-G; 3200-92-G:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Peran Contracting (1987) Inc. (Respondent) (*Granted*)
- 3230-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 114585 Canada Ltee. (Respondent) (*Granted*)
- 3241-92-G:** International Union of Operating Engineers, Local 793 (Applicant) v. West Front Construction Ltd. (Respondent) (*Granted*)
- 3242-92-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. A & A Rebar Placers Ltd. (Respondent) (*Granted*)
- 3255-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. V. G. Dry-wall Acoustic Ltd. (Respondent) (*Granted*)
- 3278-92-G:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Landar Insulation Corporation Ltd. (Respondent) (*Granted*)
- 3297-92-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Hergert Electric Limited (Respondent) (*Withdrawn*)
- 3299-92-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lynx Cabling Systems Ltd. (Respondent) (*Withdrawn*)
- 3300-92-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Keith Russell Electric Ltd. (Respondent) (*Withdrawn*)
- 3311-92-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Federal Masonry Contractors Ltd. (Respondent) (*Withdrawn*)
- 3312-92-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Wesfront Const. Ltd. (Respondent) (*Withdrawn*)
- 3313-92-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Zoppas Construction Ltd. (Respondent) (*Withdrawn*)
- 3314-92-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Fontaine Concrete Ltd. (Respondent) (*Withdrawn*)
- 3315-92-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. BLVD Forming Ltd. (Respondent) (*Withdrawn*)
- 3325-92-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Simplex Electric a Division of 488827 Ontario Limited (Respondent) (*Withdrawn*)

3327-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Standard Underground High Voltage Ltd. (Respondent) (*Withdrawn*)

3329-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Schematic Electric Ltd. (Respondent) (*Withdrawn*)

3330-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Walcom Inc. (Respondent) (*Withdrawn*)

3333-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Vale Electric Inc. (Respondent) (*Withdrawn*)

3346-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Westbrook Construction Ltd. (Respondent) (*Withdrawn*)

3347-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Entreprises de Construction Panzini Inc. (Respondent) (*Withdrawn*)

3349-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. C.P.M. Paving Company Ltd. (Respondent) (*Withdrawn*)

3356-92-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pace Construction Company (Respondent) (*Granted*)

3374-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Cornerstone Builders Limited (Respondent) (*Granted*)

3386-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Serit Construction Ltd. (Respondent) (*Granted*)

3403-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Canadian Machinery Movers Limited (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3103-90-R: Practical Nurses Federation of Ontario (Applicant) v. The Mississauga Hospital (Respondent) v. United Steelworkers of America (Intervener) (*Dismissed*)

1513-92-M: CAW Local 1980 (Applicant) v. Ford Electronics Manufacturing Corporation (Respondent) (*Dismissed*)

2825-92-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. 761723 Ontario Incorporated c.o.b. as J.P.R. Construction (Respondent) (*Granted*)

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